TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 260.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, PLAINTIFF IN ERROR,

vs.

THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED APRIL 10, 1899.

(17,363.)

(17,363.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 260.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, PLAINTIFF IN ERROR,

vs.

THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from the circuit court for the county of Marquette	1	1
Bill of complaint	1	1
Map of Lake Angeline	25	14
Answer of Lake Superior Iron Co	26	14
Answer of Cleveland Iron Mining Co	41	22
Statement as to filing replications	53	30
Evidence offered by complainant	54	30
Exhibit C—Map of township 47 N., range 27 W.	61	34
D—Map of township 47 N., range 27 W.	63	34
E—Field-notes	64	34
Map of township 47 N., range 27 W.	66	36
Testimony of E. F. Bradt	67	36
Exhibit F—Map	75	41
G—Map	80	43
H—Map	84	45
15—Map	107	59
21—Map	112	61

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 13, 1899.

	Original.	Print.
Testimony of Alfred Kidder	149	84
Exhibit I—Agreement between the Cleveland Iron Mining Co., the Lake Superior Iron Co., and the Pittsburgh and Lake Angeline Iron Co., March 17, 1892	156	88
Exhibit 20—Blue-print copy of letter of Mr. Mills to Mr. Kidder, January 30, 1896	195	112
J—Letter, Mills to Kidder, March 26, 1894	197	113
K—Agreement between the Cleveland Iron Mining Co. and the Pittsburgh and Lake Angeline Iron Co. March 21, 1894	198	113
Testimony of Thomas Walters	202	115
James Read	222	128
William Tregambo	228	131
Thomas Walters (recalled)	230	133
Complainant rests	233	135
Evidence offered by defendants	234	135
Testimony of Edwin Ball	234	135
C. H. Hall	235	136
Geo. P. Cummings	264	154
Exhibit 2*a*—Map of Lake Angeline	281	164
3*a*—Blue print	283	165
4*a*—Blue print	285	165
5*a*—Blue print	287	165
6*a*—Blue print	289	165
Lake Superior Iron Co. rests	302	174
Exhibit 2—Letter, Walters to Mills, March 2, 1892	303	174
3—Agreement of Pittsburgh and Lake Angeline Iron Co. with Cleveland Iron Mining Co., March 2, 1892	303	175
5—Certificate of Pittsburgh and Lake Angeline Iron Co. and Cleveland Iron Mining Co., December 24, 1892	305	175
7—Telegram, Hall to Fay, December 22, 1892	305	176
8—Telegram, Fay to Hall, December 23, 1892	305	176
9—Supplementary agreement between B. C. Howell and the Cleveland Iron Mining Co.	306	176
Testimony of Geo. P. Cummings (recalled)	307	177
Patrick F. Small	308	178
Exhibit 11—Proceedings of common council of city of Ishpeming, Mich., March 16, 1892	310	178
12—Letter, Laughlin to Mather, Aug. 18, 1893	313	181
13—Letter, Kidder to Mills, Nov. 2, 1893	315	181
14—Letter, Kidder to Mills, Nov. 6, 1893	315	182
16—Letter, Kidder to Mills, January 22, 1894	316	182
17—Letter, Mills to Kidder, March 26, 1894	316	182
18—Letter, Kidder to Mills, April 6, 1894	317	183
19—Letter, Kidder to Mills, April 6, 1894	318	183
20—Letter, Mills to Kidder, January 30, 1896	319	184
Testimony of D. H. Bacon	320	184
F. P. Mills	328	190

	Original	Print.
Exhibit 22—Map	337	194
Map	338	194
23—Letter, Mills to Kidder, May 8, 1890	351	202
24—Letter, Kidder to Mills, May 27, 1890	352	202
Testimony of James E. Jopling	352	202
Exhibit 24—Map	366	210
25—Blue-print picture	376	216
26—Blue-print picture	377	216
27—Blue-print picture	378	216
28—Blue-print map	382	218
29—Blue-print map	385	219
30—Blue-print map	387	219
30—Blue-print map	388	219
31—Letter, Bradt to Jopling, Dec. 12, 1895	389	219
Testimony of Andrew Youngbluth	390	219
Charles Cummings	394	222
Evidence for complainant	396	223
Testimony of Peter H. Primeau	396	223
Thomas Walters (recalled)	397	224
A. Kidder (recalled)	402	227
Evidence for defendants	403	228
Testimony of C. E. Hendrick	403	228
Exhibit 38—Blue-print map	404	228
8*a*—Blue-print map	406	229
Testimony of F. P. Mills (recalled)	407	229
Andrew Youngbluth (recalled)	408	230
Exhibit 4—Agreement between B. C. Howell and the Cleveland Iron Mining Co., March 7, 1892	409	230
36—Blue-print map	416	234
Judge's certificate to evidence	417	234
Opinion	418	235
Decree	438	246
Claim of appeal	440	247
Hearing and submission	441	248
Opinion	443	248
Decree	458	264
Petition for writ of error	459	265
Allowance of writ of error	465	268
Assignment of errors	466	268
Bond on writ of error	471	272
Docket entries	474	273
Citation and service	475	274
Writ of error	479	276
Clerk's certificate	481	277

1 The Supreme Court of the United States of America.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant and Plaintiff in Error,
vs.
THE LAKE SUPERIOR IRON COMPANY and THE CLEVELAND IRON Mining Company, Defendants in Error.

Return to Writ of Error.

Bill of complaint.

STATE OF MICHIGAN :

In the Circuit Court for the County of Marquette. In Chancery.

To the circuit court for the county of Marquette, in chancery:

Your orator, The Pittsburgh and Lake Angeline Iron Company, of the city of Ishpeming, county of Marquette, and State of Michigan, a corporation organized under the laws of the State of Michigan, brings this, its bill of complaint, against The Lake Superior Iron Company and The Cleveland Iron Mining Company, organized under the laws of the State of Michigan, defendants herein, and humbly complaining, respectfully shows unto the court:

I.

2 That upon the first day of December, eighteen hundred and fifty-one (1851), the United States Government by patent conveyed to Isaiah Briggs certain lands located in section ten (10), township forty-seven (47) north, range twenty-seven (27) west; which lands are specifically described in the records of and on the maps of the office of the surveyor general of the United States, and in the records and on the maps of the local United States land office at Marquette, Michigan; and in said patent so issued to said Isaiah Briggs as lots numbered four (4), five (5) and six (6), and the northwest quarter of fractional southwest quarter of section ten (10), in township forty-seven (47) north, of range twenty-seven (27) west, in the district of lands subject to sale at Sault Ste. Marie, Michigan; said lands together containing one hundred and twelve and twenty one-hundredths (112.20) acres, according to the official plat of said township.

And your orator further alleges that the said patent was duly recorded in the office of the register of deeds for said Marquette county, in Liber A of Deeds, page forty (40), on the twenty-fifth (25th) of June, eighteen hundred and fifty-two (1852); which patent your orator prays to be allowed to produce and prove upon the hearing of this cause, and to which patent reference is hereby made.

And your orator further alleges that said Isaiah Briggs and Sally Jane, his wife, on the second (2nd) day of May, eighteen hundred and fifty-one (1851), by warranty deed conveyed to John Burt, of

Oakland county, Michigan, an undivided one-half interest in the said southwest fractional quarter of said section ten (10), in township forty-seven (47) north, range twenty-seven (27) west, the consideration price being one hundred dollars ($100); which deed was recorded June twenty-fifth (25th), eighteen hundred and fifty-
3 two (1852), in the office of the register of deeds of Marquette county, Michigan, in Liber A of Deeds, page forty-one (41); which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which deed reference is hereby made.

And your orator further alleges that upon the eleventh (11th) day of October, eighteen hundred and fifty-one (1851), said Isaiah Briggs and Sally Jane, his wife, by quitclaim deed conveyed to the said John Burt all their right, title and interest in the said southwest fractional quarter of said section ten (10) township forty-seven (47) north, range twenty-seven (27) west; said land containing one hundred and twelve and twenty one-hundredths (112.20) acres; which deed was recorded in the office of the register of deeds of said Marquette county, June twenty-fifth (25th), eighteen hundred and fifty-two (1852), in Liber A of Deeds, page forty-three (43), which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, to which deed reference is hereby made.

And your orator further alleges that said John Burt and Julia A. Burt, his wife, on the third (3rd) day of May, eighteen hundred and fifty-three (1853) in consideration of the sum of forty thousand dollars ($40,000), by warranty deed conveyed to Heman B. Ely, of Marquette, Michigan, all their right, title and interest in the said lots four (4), five (5) and (6), and the northwest quarter of fractional southwest quarter of section ten (10), township forty-seven (47) north, range twenty-seven (27) west; which deed was recorded in the office of the register of deeds of said county May twelfth (12th) eighteen hundred and fifty-three (1853), in Liber A of Deeds, page eighty-three (83); which deed your orator prays to be allowed
4 to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which deed reference is hereby made.

And your orator further alleges that on the third (3rd) day of May, eighteen hundred and fifty-three (1853), said Heman B. Ely, by warranty deed conveyed all his right, title and interest in said lots four (4), five (5) and six (6), and the northwest quarter of fractional southwest quarter of section ten (10), in township forty-seven (47) north, range twenty-seven (27) west, to the defendant, The Lake Superior Iron Company; which last-named conveyence was recorded in the office of the register of deeds of said county May thirteenth (13th), eighteen hundred and fifty-three (1853), in Liber A of Deeds page eighty-six (86); which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, to which deed reference is hereby made.

And your orator further alleges that said lots four (4), five (5),

and six (6), of said fractional southwest quarter of section ten (10), border upon an inland lake known as "Lake Angeline;" which lake contains about one hundred seventy (170) acres in area; which lake is located in the south half of section ten (10), the southwest quarter of the southwest quarter of section eleven (11), and in the north half of section fifteen (15) in said township forty-seven (47) north, range twenty-seven (27) west; the exact location of the said lake in the said sections of land hereinafter more specifically described by metes and bounds, as shown by the courses and distances of the meander lines of the surveyors employed by the United States Government to survey the said township forty-seven north, range twenty-seven (27) west.

5 II.

And your orator further alleges that the said fractional southwest quarter of said section ten (10), township forty-seven (47) north, range twenty-seven (27) west, consists of the northwest quarter of the southwest quarter of said section ten (10), which is a full forty (40) acres, according to Government survey, and also consists of said lot four (4) containing thirty and ninety one hundredths (30.90) acres, according to Government survey, and also consists of lot numbered five (5), containing forty-one (41) acres, according to Government survey, and also consists of lot numbered six (6) containing thirty one-hundredths (.30) of an acre, according to Government survey, and also according to the description of the Government surveys as they appear in the office of the surveyor general of the United States at Washington, D. C., and in the land office of the United States Government at Marquette, Michigan; and said lands are described in said Government offices by the Government survey, not only as lots but as the fractional southwest quarter of section ten (10) of said township and range, and as being outside of the limits of the said inland lake, and as containing one hundred and twelve and twenty one-hundredths (112.20) acres, according to Government survey, and outside of the meander lines of said inland lake, and within the section lines and quarter-post lines of the said section ten (10), as fixed by Government survey.

III.

And your orator further alleges that the United States Government by patent dated July second (2nd) eighteen hundred
6 and fifty (1850) conveyed to Lorenzo D. Burnell the fractional east half of section ten (10) and the fractional west half of section eleven (11), township forty-seven (47) north, range twenty seven (27) west containing five hundred and fifty five and fifteen hundred- (555.15) acres, said acreage consisting in part of fractional Government lots fronting on said inland lake, according to the Government survey; which patent your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which patent reference is hereby made, and which is recorded in the office of the register of deeds of said county in Liber A of Deeds, page twenty (20).

And your orator further alleges, that by warranty deed said Lorenzo D. Burnell conveyed to Morgan L. Hewitt the said fractional west half of section eleven (11), and the fractional east half of said section ten (10) in said township; which last-named deed was recorded in the office of the register of deeds of said county June twelfth (12th) eighteen hundred and fifty-two (1852) in Liber A of Deeds, page twenty-two (22); which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which deed reference is hereby made.

And your orator further alleges, that said Morgan L. Hewitt, trustee, conveyed the said fractional east half of said section ten (10), and the fractional west half of said section eleven (11), to the Cleveland Iron Mining Company, one of the above-named defendants, by quitclaim deed dated May fifth (5th), 1853, in Liber A of Deeds, page one hundred and eleven (111), which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct and to which deed reference is hereby made.

7 IV.

And your orator further alleges that the southeast quarter of said section ten (10), township forty-seven (47) north, range twenty-seven (27) west, is a fractional quarter section, and consists of Government lots, according to Government survey, bordering upon the said Lake Angeline, the said inland lake above described; said lots being lots numbered two (2), containing fifty and ninety one-hundredths (50.90) acres; lot numbered three (3), containing twenty-three and twenty-five one-hundredths (23.25) acres; lot numbered seven (7), containing seven and eighty one-hundredths (7.80) acres. That the said northeast quarter of said section ten (10), contains one hundred and sixty (160) acres.

And your orator further alleges that the southwest quarter of the southwest quarter of said section eleven (11), is lot numbered one (1), bordering on said inland lake, and consists of thirty-three and twenty one-hundredths (33.20) acres. That the north half of said southwest quarter of section eleven (11) contains eighty (80) acres; and the southeast quarter of the southwest quarter of said section eleven (11) contains forty (40) acres; and the northwest quarter of said section eleven (11) contains one hundred and sixty (160) acres; and the total amount of acreage, as shown by the Government survey, contained in said fractional east half of section ten (10), and the said fractional west half of section eleven (11), as above described, and conveyed by the United States Government to said Lorenzo D. Burnell, and by said Burnell to said Hewitt, and by said Hewitt to the Cleveland Iron Mining Company, is five hundred and fifty-five and fifteen one-hundredths (555.15) acres, ac-
8 cording to the Government survey; which acreage consists of the northeast quarter of said section ten (10), containing one hundred and sixty (160) acres; and the northwest quarter of said section eleven (11), containing one hundred and sixty (160) acres;

and the north half of the southwest quarter of said section eleven (11), containing eighty (80) acres; and the southeast quarter of the southwest quarter of said section eleven (11), containing forty (40) acres; and the fractional southwest quarter of the southwest quarter of said section eleven (11), containing thirty-three and twenty one-hundredths (33.20) acres; and lot two (2) of said section ten (10), containing fifty and ninety one-hundredths (50.90) acres; and lot three (3) of said section ten (10), containing twenty-three and twenty-five one-hundredths (23.25) acres; and lot seven (7) of said section ten (10), containing seven and eighty one-hundredths (7.80) acres; all of said amounts being according to Government survey.

And your orator further alleges that said five hundred and fifty-five and fifteen one hundredths (555.15) acres was the total amount of acreage conveyed to said Lorenzo D. Burnell, by the United States Government, and the said fractional portions of said land above described constituted the territory bordering on said inland lake; which fact fully appears and is of record in the office of the United States surveyor general, and in the office of the Commissioner of the General Land Office at Washington, D. C., and in the local United States land office at Marquette, Michigan.

And your orator further alleges that the said Burnell and his grantees have acquired no title to the territory covered by said inland lake, except as acquired on account of their ownership of said lots two (2), three (3) and seven (7) of said fractional
9 section ten (10), and lot one (1) of said fractional section eleven (11) so fronting upon said inland lake, and that said frontage ownership on said lake by operation of law, and not by metes and bounds, vested in said Burnell and his grantees the riparian ownership of said inland lake opposite said lots two (2), three (3) and seven (7) of said fractional section ten (10), and said lot one (1) of said fractional section eleven (11) to the center of said lake, and a right to the land to the center of said lake, to a common point of ownership to be equitably determined between all of the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity; your orator alleging that each of said abutting owners are entitled to the territory under said lake to the center thereof, from their own abutting ownership.

V.

And your orator further alleges that on the third (3rd) day of September, eighteen hundred and fifty three (1853), the United States Government sold by cash entry number fifteen hundred and seventy-one (1571) the fractional northwest quarter of the northwest quarter of said section fifteen (15) of said township forty-seven (47) north, range twenty-seven (27) west, as lot five (5) of said section, containing thirty-eight and ninety one-hundredths (38.90) acres, to John Burt; which land so purchased from the United States Government, was patented by the United States Government to the said John Burt; which patent your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, to which patent reference is hereby made.

And your orator further alleges that said John Burt and
10 Julia A. Burt, his wife, on the sixteenth (16th) day of April, eighteen hundred and sixty (1860), by warranty deed, conveyed to Harriet Sherwood, all their right, title and interest in the said lot five (5) of said section fifteen (15), being the fractional northwest quarter of the northwest quarter of said section fifteen (15), township forty-seven (47) north, range twenty-seven (27) west, together with the hereditaments and appurtenances thereunto belonging, or in anywise appertaining. Which deed is recorded in the office of the register of deeds of Marquette county, Michigan, in Liber C of Deeds, page three hundred and fifty-three (353); which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, to which deed reference is hereby made.

And your orator further alleges that said Harriet Sherwood and Merrill B. Sherwood, her husband, by warranty deed dated August thirteenth (13th), eighteen hundred and sixty-four (1864), conveyed to James Laughlin, of Pittsburgh, Pennsylvania, and George E. Hall, of Cleveland, Ohio, all their right, title and interest in the said lot five (5) of said section fifteen (15), being the said fractional northwest quarter of the northwest quarter of said section fifteen (15), in township forty-seven (47) north, range twenty-seven (27) west; said deed being recorded in the office of the register of deeds of Marquette county, in Liber F of Deeds, on page 21; which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which deed reference is hereby made.

And your orator further alleges that on the fifteenth (15th) day of October, eighteen hundred and fifty-two (1852), the United States Government conveyed to William Pettit, by patent of that
11 date, fractional lots three (3) and four (4) of said section fifteen (15); which patent is recorded in the office of the register of deeds of Marquette county, Michigan, in Liber B, page two hundred and fifty-six (256); which patent your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which patent reference is hereby made.

Your orator further alleges that said lot three (3) is fractional and contains thirty-one and thirty five one-hundredths (31.35) acres; and said lot four is fractional and contains thirty-four and twenty-four one-hundredths (34.24) acres, according to Government survey, as shown by the records of the office of the surveyor general of the United States at Washington, and the local United States land office at Marquette, Michigan; the said lots three (3), four (4) and five (5) of said section fifteen (15) are made fractional by having a frontage upon the south side of said Lake Angeline; and your orator, as the owner of said fractional lots three (3), four (4) and five (5) of said section fifteen (15), is the owner of the riparian rights on said inland lake, and of the land under said lake to its center.

And your orator further alleges that Passmore Williamson and R. Franklin Raley were the executors and trustees under the last

will and testament of the said William Pettit, deceased, late of the city of Philadelphia, State of Pennsylvania, and that the will of the said deceased was duly admitted to probate and registered in the probate court in the said city of Philadelphia according to the laws of the State of Pennsylvania; said Philadelphia being the residence of the said William Pettit at the time of his death, and of Jane R. Pettit, his wife, and Elizabeth P. Allen, his daughter, they being the sole legatees under said will, as your orator is informed and believes; and by the said will and
12 the probate thereof, the said Passmore Williamson and R. Franklin Raley became the acting executors of the estate of said William Pettit, with authority to sell and dispose of the real estate of the said deceased, in case the wife and daughter of said deceased, Jane R. Pettit and Elizabeth P. Allen, should consent to such sale, as your orator is informed and believes. Which consent was obtained from them, and a joint deed of said Jane R. Pettit and Elizabeth P. Allen and her husband, Charles M. Allen, sole heirs of said William Pettit, deceased, and the said executors, was made with warranty as to their own acts, thereby conveying said fractional lots three (3) and four (4) of said section fifteen (15), to Francis N. Buck, of the city of Philadelphia, Pennsylvania; which deed is recorded in the office of the register of deeds of Marquette county, in Liber B of Deeds, page two hundred and fifty-nine (259); which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which deed reference is hereby made. And your orator alleges that the will of the said William Pettit was also admitted to probate in said Marquette county, Michigan, on the twenty-third (23rd) day of August, eighteen hundred and sixty-nine (1869), as shown by the records of the probate court of said county.

And your orator further alleges that said Francis N. Buck and Jane E. Buck, his wife, by warranty deed dated August twenty-fourth (24th), eighteen hundred and sixty-three, conveyed to George E. Hall, of Cleveland, Ohio, said lots three (3) and four (4), in said section fifteen (15), above referred to; said lot numbered three (3), being the fractional northwest quarter of the northeast quarter of said section fifteen (15); and lot numbered four (4), being
13 the northeast quarter of the northwest quarter of said section fifteen (15), said two lots containing sixty-five and fifty-five one-hundredths (65.55) acres, according to the Government survey. Said last-named deed is recorded in the office of the register of deeds of Marquette county, Michigan, in Liber D of Deeds, page two hundred and fifty-six (256); which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which deed reference is hereby made.

And your orator further alleges that on the thirtieth (30th) day of September, eighteen hundred and sixty-five (1865), said James Laughlin and George E. Hall, and their wives, by warranty deed, conveyed to the plaintiff, The Pittsburgh and Lake Angeline Iron

Company, all their right, title and interest in said lots numbered three (3), four (4) and five (5), of said section fifteen (15), in township forty-seven (47) north, of range twenty-seven (27) west; said lot numbered three (3), being fractional northwest quarter of the northeast quarter; lot numbered four (4), being fractional northeast quarter of the northwest quarter, and lot numbered five (5), being fractional northwest quarter of the northwest quarter of said section fifteen (15), township forty-seven (47) north, range twenty-seven (27) west, as containing one hundred and five and fifty-five one-hundredths (105.55) acres, according to Government survey; which deed is recorded in the office of the register of deeds of Marquette county, Michigan, in volume F of Deeds, page five hundred and thirteen (513); which deed your orator prays to be allowed to produce and prove upon the hearing of this cause, as this honorable court shall direct, and to which deed reference is hereby made.

14 And your orator further alleges that the defendant, The Lake Superior Iron Company, by warranty deed, dated July tenth (10), eighteen hundred and sixty-seven (1867), conveyed to the complainant, lot six (6), in the southwest quarter of said section ten (10), reserving the minerals thereunder, and the right to remove the same; which deed was recorded November sixth (6), eighteen hundred and sixty-seven (1867), in the office of the register of deeds of said county, in Liber H of Deeds, page six hundred and one (601), to which record reference is hereby made. And your orator further alleges that by virtue of said last-named deed, your orator acquired all the right, title and interest of said defendant, to the said lot six (6), and its abutting riparian ownership, to the center of said Lake Angeline, except the minerals thereunder and the right to remove said minerals therefrom.

And your orator further alleges that said William Petit departed this life in the city and county of Philadelphia, and State of Pennsylvania, in the year 1853, and prior to the tenth day of August of that year; and that his last will and testament was duly admitted to probate, in the court, for the probate of wills in the city and county of Philadelphia, and State of Pennsylvania, in the month of August, of the year 1853, and after his death. And your orator further alleges that it has been in possession of said lots three, four and five, of said section fifteen (15), continuously since the 24th day of August, 1863, prosecuting mining operations thereon.

Complainant further alleges that it has been the owner of lot two, of section fifteen, township forty-seven north, range twenty-seven west, and in possession of the said land as a part of its mining property since the year 1864.

15 Your orator further alleges that said fractional southwest quarter of the southwest quarter of said section eleven (11), and said lots two (2), three (3), four (4), five (5), six (6) and seven (7), of said section ten (10), and lots two (2), three (3), four (4) and five (5), of said section fifteen (15), constitute the entire territory fronting on said inland lake, known and described as "Lake Angeline," above referred to; and that all the said fractional Government descriptions of said land so fronting on said lake, are owned by the

complainant, or the defendants above referred to, according to the specific interests of each, as herein set forth. And your orator alleges that the said abutting owners upon said inland lake are owners of the land and minerals under said lake, according to the amount of frontage land upon the said lake owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake, as determined and equitably designated between the complainant and the defendants by the rules of equity.

VII.

And your orator alleges that the courses and distances of the meander lines of the said inland lake, as shown by the field-notes of the surveys of the United States Government, as appear in the office of the surveyor general of the United States, according to the survey made and filed in the office of the surveyor general at Detroit, Michigan, March 15th, eighteen hundred and forty-nine, are as follows: Commencing at a point on the section line between sections ten (10) and eleven (11), township forty-seven (47) north, range twenty-seven (27) west, one and one-half (1½)
16 chains north of the southeast section corner of said section ten (10) at meander post number eleven (11); thence north seventy-seven degrees (77) east four (4) chains; thence south seventy-five (75) degrees east seven (7) chains; thence east one (1) chain and fifty (50) links; thence north three (3) chains; thence north sixty-five (65) degrees west, five (5) chains; thence north fifty (50) degrees west, five (5) chains; thence north eighty (80) degrees west, three (3) chains and seventy-eight (78) links, to meander corner No. 12, on the north and south section line between said sections ten (10) and eleven (11); thence north eighty (80) degrees west, six (6) chains; thence due west six (6) chains and fifty (50) links; thence north thirty-five (35) degrees west, five (5) chains; thence north forty-five (45) degrees west, five chains; thence north forty (40) degrees west, six (6) chains; thence north sixty (60) degrees west, ten and one-half (10½) chains; thence due west eleven (11) chains; thence south fifty-eight (58) degrees west, nine (9) chains and fifty (50) links; thence south twenty (20) degrees west, ten (10) chains; thence south ten (10) degrees east six (6) chains; thence south eighty (80) degrees west, ten (10) chains and fifty (50) links; thence south fifty-five (55) degrees west, seven (7) chains; thence south ten (10) degrees west three (3) chains and fifty (50) links; thence south eighty-one (81) degrees east, two (2) chains, to meander post number thirteen (13), located on the south line of said section ten (10), between said sections ten (10) and fifteen (15), as shown by the map of said sections on said tract book, volume nineteen (19), folio eighty (80), above referred to; thence south seventy (70) degrees east, six (6) chains; thence due east three (3) chains; thence south thirty-five (35) degrees east, four (4) chains; thence north, seventy-five (75) degrees east,
17 three (3) chains and fifty (50) links; thence north sixty-two (62) degrees east, nine (9) chains and fifty (50) links, to meander post number fourteen (14) located on the south line of said

section ten (10) between said sections ten (10) and fifteen (15) in said township and range, as shown by the said map of the said Government tract above referred to. Thence north eighty (80) degrees east, three (3) chains and sixty (60) links; thence south seventy eight (78) degrees east, three (3) chains and twenty (20) links, to meander corner number fifteen (15) located on the south line of said section ten (10) between said sections ten (10) and fifteen (15) in said township and range. Thence south sixty (60) degrees east, eleven (11) chains; thence south seventy-five (75) degrees east, ten (10) chains; thence due east four (4) chains; thence north seventy (70) degrees east, three (3) chains and fifty (50) links; thence due north three (3) chains; thence north, seventy-five (75) degrees west, eight (8) chains; thence north forty-five (45) degrees west, two (2) chains, and sixty-five (65) links, to meander corner number sixteen (16) located on the south line of said section ten (10) between said sections ten (10) and fifteen (15), as appears upon the said tract book as above set forth. Thence north forty-five (45) degrees west, three (3) chains; thence north twenty degrees east, two (2) chains; thence north seventy-six (76) degrees east, six (6) chains and seventy-five (75) links; thence south sixty (60) degrees east seven (7) chains and fifty (50) links; thence due east five (5) chains; thence north seventy-five degrees east, five (5) chains and thirty (30) links to the place of beginning at meander post number (11) located on the east line of said section ten (10).

And your orator further alleges that within the last four
18 or five years, by mutual consent, your orator and the said defendants shared in the expense of pumping out and draining the said inland lake; your orator paying three-fifteenths of said expense, the defendant, The Lake Superior Iron Company, four-fifteenths, and the Cleveland Iron Mining Company the balance, so that now said lake has been drained of water, except what is easily disposed of by moderate pumping.

And your orator further alleges that the territory covered by the said lake belonging to and owned by your orator, by virtue of the ownership of said lots — (2), three (3), four (4) and — (5) of said section fifteen (15), bordering upon the shore of said inland lake, would be that territory described as follows: Commencing at meander corner number sixteen (16) on the south boundary line of section ten (10), township forty-seven (47) north, range twenty-seven (27) west, twenty-one and seventy-two one-hundredths (21.72) chains west of the southeast corner of said section ten (10); thence north fifty-one degrees (51 degrees) forty-nine minutes (49 minutes) west, twenty and seventy-five one-hundreths (20.75) chains; thence south two degrees (2 degrees) thirty-seven — (37 minutes) west, twelve and eighty-four one-hundre-ths (12.84) chains, to meander corner number fifteen (15) on said south boundary line of said section ten (10); thence south sixty degrees (60 degrees) east, eleven (11) chains; thence south seventy-five degrees (75 degrees) east, ten (10) chains; thence east four (4) chains: thence north seventy degrees (70 degrees) east, three and fifty one-hundredths (3.50) chains; thence north three (3) chains; thence north seventy-five degrees (75 de-

grees) west, eight (8) chains; thence north forty-five degrees (45 degrees) west, two and sixty-five one-hundre-ths (2.65) chains to said meander corner number sixteen (16), the place of commencement, and including twenty-three and
19 thirty-eight one hundredths (23.38) acres, more or less. Also the territory described as follows: Commencing at meander corner number fourteen (14) on the south boundary line of said section ten (10), township forty-seven (47) north, range twenty-seven (27) west forty-five and twenty-five one-hundredths (45.25) chains, west of the southeast corner of said section; thence north twenty-six degrees (26 degrees), fifty-five minutes (55 minutes) east fourteen and fifty-eight one-hundredths (14 58) chains; thence south sixty-six degrees (66 degrees) and sixteen minutes (16 minutes) west thirty-two and twenty-nine one-hundredths (32.29) chains, to meander corner number thirteen (13) on the meander line of said lake; thence south seventy degrees (70 degrees) east, six chains (6); thence east three (3) chains, thence south thirty-five degrees (35 degrees) east four (4) chains; thence north seventy-five degrees (75 degrees) east three and fifty one-hundredths (3.50) chains; thence north sixty-two degrees (62 degrees) east, nine and fifty one-hundredths (9.50) chains, to said meander corner number fourteen (14), the place of commencement, and including twenty and forty-nine one-hundredths (20.49) acres, more or less. Said territory so claimed by your orator as its territory is shown by a map hereto attached marked "Exhibit A," which map sets forth the sections upon which said inland lake is located, and the courses and distances of the meander line of said lake and the meander corner, as shown by the survey of the United States Government thereof; which map also shows the lines surrounding the portions of the territory owned by your orator as above described, formerly covered by the water of said inland lake, and marked as follows: "P. & L. A. I. Co. territory," with the territory lying between said portions of said lake so marked also marked
20 "L. S. I. Co. and C. I. M. Co. territory," being the territory opposite said lot number six (6); the surface of which lot lying west of the north and south center line of said section ten (10) was conveyed to your orator, the minerals being reserved by said The Lake Superior Iron Company, defendant, which portion of said lot six (6) subject to said mineral reservation your orator is the owner to the center of said Lake Angeline, to the extent of the territory marked on said map "Exhibit A," "L. S. I. Co. and C. I. M. Co."

And your orator alleges that it owns said territory formerly under the water of said inland lake by virtue of its riparian ownership, as abutting owner upon the south side of said inland lake, under the laws of property ownership, established by the decisions of the courts of the State of Michigan and of the United States, as well as other States and countries; and that it has ever been the owner hereof, since it purchased said lots two (2), three (3), four (4) and five (5) of said section fifteen (15), as previously set forth. And your orator alleges that the defendant, The Lake Superior Iron Company, owns, on account of its frontage upon the said inland

lake, from its frontage above described on the northwesternly shore of said lake to the said lines of ownership of your orator to the vertical point near the center of said lake, being the point of intersection above referred to, and that the defendant, The Cleveland Iron Mining Company, owns on account of its frontage above described on the northeasterly shore of said lake in a southerly direction to the said lines of ownership of your orator to the vertical point near the center of said lake, being the point of intersection above referred to. And your orator alleges that it and the said defendants are the owners of the entire territory, formerly
21 covered by the water of the said inland lake, known as Lake Angeline, and that the exact boundary lines of ownership have never been established and fixed between your orator and the said defendants, and your orator desires that the same may be fixed and established by the decree of this honorable court, in accordance with the principles of law and equity.

VIII.

And your orator further states, that it is informed and believes, and states the facts to be, that the defendant, The Lake Superior Iron Company, has recently asserted ownership of a large portion of the said territory previously covered by the waters of Lake Angeline belonging to your orator, above described, to wit: all of said inland lake lying west of the north and south center line of said section ten (10), and north of the section line between said sections ten (10) and fifteen (15), if projected east and west through the said inland lake, said defendant utterly disregarding, in its claim, the long-established principles of law, as to riparian ownership of abutters on the waters of an inland lake; and your orator further charges, on information and belief, that the said defendant, The Lake Superior Iron Company, has begun the work of exploring for iron ore upon the territory of your orator, as above described, as so wrongfully claimed by that company from the territory of your orator, and is now trespassing upon the said rights of your orator, by establishing and operating drilling machines, preparatory to the mining of iron ore upon the said territory of your orator, lying west of said center line of said section ten (10), and north of the said north line of section fifteen (15), upon the territory so owned by your orator and formerly covered by the waters of the said in-
22 land lake. And your orator further states, that it is informed and believes, and states the fact to be, that the said defendant, The Cleveland Iron Mining Company, by itself and its agents, claims to be the owner of the territory of your orator above described as owned by your orator, formerly covered by the waters of said inland lake, lying west of the center line of said section ten (10), and north of the south line of said section ten (10), if projected through the territory previously covered by the water of said Lake Angeline. And your orator alleges that it is informed and believes and charges the fact to be that the said defendant, The Cleveland Iron Mining Company, is now preparing for and is actually exploring for iron ore from, in and under the said territory so owned by

your orator, by digging and drilling therein, and in other ways asserting ownership to the said property of your orator, in disregard of the rights of your orator, and *and* is now trespassing upon the said rights of your orator, in the manner above described. And your orator alleges that the said claims of ownership in the said property of your orator, above described, and rights in the same, as asserted by the said defendants, as above set forth, constitute a cloud upon your orator's said title and an apparent incumbrance thereon, and greatly reduces the market value of the capital stock of your orator and of its mining property, and is an unwarranted trespass upon the rights of your orator; and your orator believes that from the claims and assertions of the said defendants, and from what has already been done by the said defendants, in the trespassing upon the said rights of your orator, as above set forth, they will proceed to dig and remove from the territory of your orator large quantities of valuable iron ore, unless restrained by the injunction of this honorable court.

23 IX.

Forasmuch therefore, as your orator is without adequate remedy in the premises, except in a court of equity, and to the end that the said, The Lake Superior Iron Company, and The Cleveland Iron Mining Company, the above named defendants, may be caused to make full and direct answer to this bill of complaint, but not under oath (their answers under oath being hereby waived), and that the said defendants, their agents and attorneys, may be restrained by the injunction of this honorable court and decreed to forever desist from interfering with the said premises, or any portion of said territory, so formerly covered by the waters of said inland lake, known as Lake Angeline, and from removing or attempting to remove or interfering with the iron ore on, in and under the said territory above described as the territory of your orator, and that this honorable court decree a designation of the territory owned by your orator and the said defendants, by lines that shall equitably locate the territory of your orator and the said defendants, and that this honorable court decree that your orator is the owner of the said portion of territory abutting said lots two (2), three (3), four (4) and five (5) of said fractional section fifteen (15), within the boundary lines as above set forth and described by your orator, and claimed by it, and that this honorable court decree, that the claims and assertions of the said defendants as to the ownership of said territory or any portion thereof *is* null and void and of no force whatever, and do not constitute a cloud upon your orator's title to the said portion of the said territory formerly covered by the said waters of the said inland lake, and that your orator may have such other and such further relief in the premises, as equity may require and to your honor may seem meet,

24 May it please the court, to grant unto your orator, the people's writ of injunction, issued out of and under the seal of this honorable court, directed to the said defendants, their servants, agents and attorneys, commanding them, and each of them,

their servants, agents and attorneys, them and each of them, not to interfere with your orator in the peaceable possession of the said property, and restraining them from exploring or mining upon the said land or exercising any acts of ownership thereto, and that the said defendants, their servants, agents and attorneys forever desist from further interfering with your orator, in its control and management and possession of its said property, above described.

May it please the court, to grant unto your orator the writ of subpœna, issued out of and under the seal of this honorable court, to be directed to the said defendants, commanding them and each of them, upon a certain day and under a certain penalty to be therein inserted, to be and appear before this honorable court, then and there to answer the premises, and further to stand to and abide by such order and decree therein as shall be agreeable to equity and good conscience, and your orator will ever pray, etc.

PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
By ALFRED KIDDER, *Ag't.*

CLARK & PEARL,
Solicitors for Complainant.
ALFRED RUSSELL, *Of Counsel.*

Endorsed: Filed Nov. 23, 1896. Gad Smith, register.

(Here follows diagram marked p. 25.)

26 *Answer of Lake Superior Iron Company.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Marquette. In Chancery.

The several answer of The Lake Superior Iron Company, defendant, to the bill of complaint of The Pittsburgh & Lake Angeline Iron Company, complainant, filed and exhibited against this defendant and the Cleveland Iron Mining Company.

This defendant saving to itself, all, and all manner of benefit or advantage of exception, or otherwise, that can, or may be, taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or so much thereof as this defendant is advised it is material, or necessary for it to make answer to, answering says:

1. That this defendant admits that the United States, on the first day of December, one thousand eight hundred and fifty-one, conveyed by patent to Isaiah Briggs those certain tracts of land situated in said county of Marquette, particularly described as lots numbered four (4), five (5) and six (6), and the northwest quarter of fractional southwest quarter of section ten (10), in township forty seven (47) north, of range twenty-seven (27) west, containing in all, according

to the Government survey, one hundred and twelve and twenty one-hundredths acres.

This defendant further admits that by virtue of the several conveyances mentioned in the paragraph numbered "I" of said bill, said parcels of land became fully vested in this defendant on the conveyance thereof to this defendant by Heman B. Ely, as in said bill set forth, on the thirteenth day of May, one thousand eight hundred and fifty-three; that said parcels of land constitute
27 practically the southwest fractional quarter of said section ten (10). By the conveyance made by Isaiah Briggs and wife to John Burt mentioned in said paragraph "I" of said bill, wherein the said lands were described as southwest fractional quarter of section ten (10), the said parties meant and intended to convey, and said grantors did convey the said lots numbered four (4), five (5) and six (6) and the northwest quarter of the southwest quarter of said section ten (10), although a small part of said lot No. six (6), extended and now extends a short distance east of the north and south quarter line of said section ten (10).

This defendant alleges that by said conveyance the whole of said parcels of land became vested in this defendant, as well *as* that small portion of lot No. six (6) that lies east of the north and south quarter section line of said section, as that portion of said section which lies west of said line.

2. This defendant admits the matters set forth in paragraph "II" of said bill, except that it says that a small portion of said lot No. six (6) lies east of the north and south center line of said section ten (10), as hereinbefore stated.

3. This defendant admits the allegations contained in paragraph No. "III" in said bill, but says that the entry of the lands by Lorenzo D. Burnell, and the purchase thereof at the local land office was made by fractions, and although said patent described the same as the east half of section ten (10), the acreage given corresponded to that of the parcels and fractions of land contained in said east half, excluding the small portion of lot No. six (6), which, as hereinbefore stated, extended east of the north and south quarter line of said section, and said patent was not intended to convey, and in fact did not convey to said Lorenzo D. Burnell any portion of said lot No. six (6).

28 4. This defendant admits that the southeast quarter of said section ten (10) is a fractional quarter section and consists of Government lots bordering on said Lake Angeline, numbered, and containing the number of acres respectively as set forth in paragraph "IV" of said bill and was not intended to include, and does not include, as used in said patent, any portion of said lot No. six (6).

This defendant admits the statement in said paragraph "IV" of said bill setting forth the acreage of the several Government subdivisions in said sections ten (10) and eleven (11); that the said five hundred and fifty-five and fifteen one-hundredth acres was the total amount of acres conveyed to the said Lorenzo D. Burnell by the United States Government, and that said fractional portions of

said land bordered on said inland lake. As to the remainder of said paragraph "IV," this defendant denies that the law is correctly stated therein, but admits that said Cleveland Iron Mining Company is, by virtue of its ownership of a certain portion of the shore of said lake entitled to the ownership of a certain portion of the bed of said lake.

5. This defendant admits that lot No. five (5) of section fifteen (15) of township forty-seven (47) north, of range twenty-seven (27) west, was entered by John Burt, as set forth in paragraph "V" of said bill, but whether said entry was carried to patent, or canceled, this defendant is not informed save by said bill, and neither admits or denies the same, but leaves said complainant to its strict proof thereof. Whether said lot No. five (5) was conveyed by said John Burt and his grantees, and whether the title to said lot No. five (5) became vested in said complainants, this defendant is not informed and neither admits or denies the same, but leaves said complainant to its strict proof thereof.

29 This defendant admits that the United States, by patent dated on the fifteenth day of October, one thousand eight hundred and fifty two, conveyed to William Pettit fractional lots numbered three (3) and four (4) of said section fifteen (15); that said lot No. three (3) contains thirty-one and thirty-five one-hundredth- acres, and that said lot No. four (4) contains thirty-four and twenty-four one-hundredth- acres, according to the Government survey, and that the same are made fractional by said Lake Angeline, and have a frontage on the south side of said lake, but this defendant denies that the said complainant, if the owner of said lots, is the owner of the land under said Lake Angeline to its center.

As to the allegations in said paragraph "V" contained, to the effect that Passmore Williamson and R. Franklin Raley, together with Jane R. Pettit and Elizabeth P. Allen, conveyed said lots No. three (3) and four (4) to Francis N. Buck, or executed a deed purporting to convey the same, this defendant is not informed concerning the same, and neither admits or denies said allegation, but leaves said complainant to its strict proof thereof; but this defendant says that it does not appear from said allegations that the title that was obtained by William Pettit from the United States to said lots No. three (3) and four (4) was ever transferred to said Francis N. Buck or any other person, because it does not appear by any allegation in said bill contained, that said William Pettit was deceased at or before the time of said convevance, or that said grantors did otherwise acquire the title, and this defendant claims the benefit of a demurrer to said allegation, and to all the allegations of said bill, whereby the complainant claims any benefit or rights by virtue of an ownership of said lots No. three (3) and four (4).

30 Whether the said Francis N. Buck and wife made a conveyance purporting to convey said lots three (3) and four (4) to George E. Hall, and whether said George E. Hall and James Laughlin made a conveyance to the complainant as alleged in said paragraph "V," this defendant is not informed, save by said bill,

and neither admits or denies the same, but leaves said complainant to its strict proof thereof.

This defendant admits that it conveyed by deed dated July 10th, one thousand eight hundred and sixty-seven, said lot No. six (6) of said section ten (10) to said complainant, reserving all minerals and ores of metals thereon, and the exclusive right to mine the same forever, and that said complainant thereby acquired all the riparian rights that before then belonged to this defendant, with the exception of the ores and minerals in, and under, the bed of said lake, and the right to mine and remove the same.

6. This defendant admits that the fractional southwest quarter of the southwest quarter of section (11), and said lots No. two (2), three (3), four (4), five (5), six (6) and seven (7) of said section ten (10), and lots No. two (2), three (3), four (4) and five (5) of said section fifteen are all Government subdivisions fronting on Lake Angeline, as alleged in paragraph "VI" of said bill; that the subdivisions hereinbefore mentioned as having been conveyed to this defendant belong to this defendant; that said lots No. two (2), three (3) and seven (7) of said section ten (10), and said southwest quarter of fractional southwest quarter of section eleven (11) belong to said Cleveland Iron Mining Company, but whether the title to said lots No. two (2), three (3), four (4) and five (5) of said section fifteen (15) has ever been vested in either of the parties to this suit, this defendant is not advised, and neither admits
31 or denies the same, but leaves said complainant to its strict proof thereof.

This defendant admits that the abutting owners upon said Lake Angeline are the owners of the land and minerals under said lake, but denies that all the said owners, and particularly that the said complainant, is the owner of the land under the waters of said lake to the center of said lake.

7. This defendant is not advised save by said bill, whether the courses and distances of the meander lines of said lake, as shown by the field-notes of the surveys made under the authority of the United States, are as set forth in paragraph "VII" of said bill, or not, and this defendant neither admits or denies the same, but leaves said complainant to its strict proof thereof.

This defendant admits that said Lake Angeline has been pumped and drained, as set forth in said paragraph "VII," and that the expense there was shared by the parties to this suit, as therein set forth.

This defendant denies that said complainant is entitled to any such portion of the bed of said Lake Angeline as is claimed by it in said paragraph "VII" of its bill, or that it is entitled to, or the owner of, any portion of the bed of said lake situated in said section ten (10), except such riparian rights as it is entitled to by reason of its purchase of said lot No. six (6) from this defendant, as hereinbefore stated, excluding all mineral and mining rights therein.

This defendant admits that the said complainant, and the said defendants, are the owners of all the bed of said lake, but denies that the division thereof according to the laws of this State, is, or

would be, in accordance with the allegations of said bill, or that the lines of ownership of said three parties would converge
32 to a common center, or that the said complainant has any ownership of any portion of the bed of said lake lying north of the south line of said section ten (10) except its riparian rights acquired by the conveyance to it of lot No. (6) of section ten (10), as aforesaid.

8. This defendant admits that it has not only recently, but for many years, asserted and claimed the ownership of a considerable portion of the bed of said lake that is now claimed by said complainant in its bill, and all of the said inland lake lying north of the south line of said section ten (10) and west of the north and south quarter line of said section, as well as that portion of the bed of said lake that belongs to that portion of lot No. six (6) aforesaid, which lies east of said north and south quarter line, except as to the surface rights in that portion of the bed of said lake belonging to said lot No. six (6), which was conveyed to said complainant; and this defendant alleges that it has claimed the same lawfully and rightfully, and not as alleged by said bill, contrary to the rights of said complainant.

As to the allegations contained in paragraph "VIII" of said bill relative to the claim set up by said Cleveland Iron Mining Company, this defendant neither admits or denies the same, but leaves said complainant to its strict proof thereof.

9. This defendant further shows in answer to the complainant's bill, that some time prior to the year one thousand eight hundred and ninety-two, the existence of a valuable deposit of iron ore in and underneath the bed of said Lake Angeline became known. Prior to said discovery, the bed of said lake and the riparian rights of the respective owners of property abutting thereon were regarded of little or no value. Said lake was a body of water of the average depth of twenty-three and $\frac{2}{10}$ feet, and up-
33 wards, and the bed thereof consisted of a deep layer of thin mud resting upon the underlying rock. In the early part of the year 1892 the said complainant, together with this defendant and said Cleveland Iron Mining Company negotiated with a view of joining together and pumping the water from said lake, so that the mining of iron ore in the bed thereof would be practicable. In said negotiations it was understood and agreed that said complainant was the owner of so much of the bed of said Lake Angeline as lies opposite the land belonging to it in section fifteen (15), and between the shore thereof and the north line of said section fifteen (15) extended across the waters of said lake, and that all said complainant's rights in the bed of said lake were confined to that portion of the bed of said lake that lies south of said north line of section fifteen (15), extended as aforesaid. All said negotiations were conducted upon that basis, and with that understanding. With that view, an agreement was made in writing between the said Cleveland Iron Mining Company, as first party, and this defendant as second party, and said complainant as the third party, bearing date the 17th day of March, A. D. 1892, wherein it was recited that the said parties

severally owned all the land surrounding Lake Angeline; that iron ore had been discovered under the bed of said lake, and it had become necessary to pump out the water of said lake, and permanently thereafter drain the bed thereof, in order that each of the said parties might economically mine said ore as lies under such portion of said bed as belonged to each of said parties, respectively. It was therefore agreed between the said parties, in and by said written contract, that said pumping and draining should be done, and that each of the said parties
34 should contribute to the expense thereof as follows, to wit: the said Cleveland Iron Mining Company agreed to bear eight-fifteenths ($\frac{8}{15}$) of the entire cost and expense of pumping the water out of said lake, including the cost of the pumping machinery, and apparatus provided for that purpose, and in addition thereto one-fifth ($\frac{1}{5}$) of the cost of said pumping machinery and apparatus. This defendant agreed to bear and pay, and did pay four-fifteenths ($\frac{4}{15}$) of the entire cost of pumping out said lake, including the cost and purchase price of said pump and apparatus for pumping and draining the same. Said complainant agreed to bear and pay three-fifteenths ($\frac{3}{15}$) of the entire cost and expense of pumping out and draining said lake, but no part of the cost of said pumping machinery and apparatus.

Said Cleveland Iron Mining Company undertook and agreed, in and by said contract, to maintain and continue to operate said pumping plant and apparatus for the continuous and permanent drainage of said lake, advancing money for necessary expense, and this defendant agreed to share said expense of permanent drainage and pumping with said Cleveland Iron Mining Company in such proportion as the number of tons of iron ore mined in the bed of said lake each year by this defendant, should bear to the total amount of iron ore mined therein by this defendant and said Cleveland Iron Mining Company, and said Cleveland Iron Mining Company was to bear two-thirds ($\frac{2}{3}$), and this defendant one-third ($\frac{1}{3}$), of the cost of any additional or other apparatus which might be needed for such permanent drainage.

Said complainant, in and by said agreement, did not undertake to bear any of the expense of such permanent drainage, but
35 agreed to maintain a flume so constructed above the then present water level of Lake Angeline as to divert and carry away all the surface water, or other surface drainage, which would otherwise come into the then present bed of said lake from all the land lying above the said water level and south of the south line of section ten (10) (which is also the north line of section fifteen (15) as projected through said lake), and also to run into said flume any and all water which said complainant should pump from its mine, or mines. Said complainant agreed to maintain, keep in good repair and successful operation, said flume diverting said drainage from the bed of said lake, until the iron ore, to which said complainant was entitled, lying on, in, or under that portion of the bed of said lake, lying south of said south line of section ten (10), should be mined and exhausted, and then to turn over said flume, in good

repair, to the said Cleveland Iron Mining Company and this defendant, and allow them to operate the same thereafter for the purpose of continuing said drainage. But after the mining of such ore as it should see fit to mine in that part of the bed of said lake which lies south of the south line of said section ten (10), said complainant did not undertake to aid in any way in said drainage, or to pay any portion of the expense thereof.

Said agreement was entered into between said three parties upon the express understanding of all that the rights of said complainant in the bed of said lake were confined to the area hereinbefore mentioned and the moneys expended in machinery and apparatus purchased for the purpose of draining said lake and the expense incurred by this defendant and said Cleveland Iron Mining Company since the pumping of said lake, has been incurred and expended in reliance upon said understanding and agreement.

36 The money paid by this defendant as its proportion of the cost of pumping said lake with the machinery and apparatus purchased for that purpose amounted to the sum of thirteen thousand nine hundred and $\frac{86}{100}$ dollars, and since the completion of the pumping of said lake, and before the commencement of this suit, this defendant has paid, as its proportion of the expense of the continuous drainage thereof, for the benefit of said complainant, as well as of itself and said Cleveland Iron Mining Company, the sum of four thousand twenty-six and $\frac{79}{100}$ dollars.

During all this time, and until the commencement of this suit, it has never been claimed by said complainant that it was entitled to any portion of the bed of said Lake Angeline for mining purposes north of the south line of section ten (10), nor to any interest whatever in the bed of said lake north of said line, except as to such rights as it became entitled to by virtue of the conveyance to it of lot six (6) of said section ten (10), with mineral reservations and exceptions as hereinbefore set forth.

During that time said complainant has repeatedly recognized the fact that it was the owner of no mineral or mining rights north of the south line of said section ten (10), by settling and paying for iron ore accidentally mined by it over and beyond said line, and in numerous other ways.

Between the time of the pumping of said lake and the commencement of this suit, this defendant has carried on extensive explorations in that part of the bed of said lake lying north of lots No. four (4) and five (5) of section fifteen (15), and north of the south line of section ten (10) as extended, sinking numerous diamond drill holes to great depths, and at great expense, for the purpose of

37 ascertaining the existence, or non-existence in such localities of iron ore suitable for mining. Said explorations have been carried on openly and with the knowledge of said complainant, in such a manner and in such localities as to thoroughly test all the territory embraced within the bed of said lake, and within the boundary lines now claimed by said complainant, lying north of said south line of section ten (10).

By means of such explorations this defendant has discovered

and developed a valuable body of iron ore under the bed of said lake, and within the boundaries now claimed by the complainant, and has, before the commencement of this suit, made extensive openings, adits and shafts, for the purpose of mining said body of ore.

In the prosecution of said explorations, and making said openings, adits and shafts, for the purpose of mining said body of ore, after the making of said drainage agreement, and prior to the commencement of this suit, this defendant has expended a large sum of money, amounting to at least the sum of one hundred forty-nine thousand, one hundred eleven $\frac{22}{100}$ dollars, and during all said explorations said complainant, before the beginning of this suit, has never protested against the same, or objected thereto, or made known to this defendant that it claimed any rights in the bed of said lake, north of said south line of section ten (10). and it is only since the discovery of a valuable deposit of iron ore by this defendant in the bed of said lake that the said complainant has set up a claim to that portion of the bed of said lake lying within the limits of section ten (10), and has drawn the line of its claim in such a manner as to embrace a considerable portion of the deposit of ore so
38 discovered and developed by this defendant by its explorations as aforesaid; all of which this defendant submits is inequitable and unjust, and said complainant is estopped to assert such claim, if it were otherwise entitled thereto.

10. This defendant further shows that if it should be held that, notwithstanding all the facts hereinbefore alleged, the rights of the said complainant are not confined to the territory south of the south line of said section ten (10), it is nevertheless not entitled to the quantity of the bed of said lake as claimed by it in its said bill, nor to that portion of said bed that it so claims. The shape of said lake is so irregular that it is impossible, and would be inequitable and unjust, to attempt to carry the lines of all the riparian proprietors to a common center; that if the several proprietors have rights in the said lake irrespective of section lines, their rights must be bounded by a certain line drawn from one end of the lake to the other instead of running to a common center. It is perfectly practicable to draw a line from one extremity to another, equidistant from the north and south shores of said lake, allot ing to each parcel of land its proper proportion of the bed of said lake extending to said center line, if said complainant is entitled to go to said center line.

That part of said lake which bounds portions of lots Nos. four (4) and five (5) of section fifteen (15), is an arm of said lake, separate and distinct from the main body of the lake, and in setting off or designating portions of the bed of said lake as appurtenant to said lots and to the other lots and parcels abutting on said arm, the same should be considered separately from the remainder, or main body of said lake, and the riparian rights of the owner of said lots should not extend into said arm of the lake beyond the
39 center line thereof, and should not extend easterly beyond a line drawn from the eastern extremity of the shore line thereof at right angles with said center line at that point.

That portion of said lake on which said lots numbered two (2) and three (3) abut is also a distinct arm of the lake, and the riparian rights of the owners of said lots should be restricted and confined in accordance with the principles aforesaid.

11. This defendant further shows that it is in the open and actual possession of all portions of the bed of said lake claimed by it; that the rights of this defendant in the bed of said lake and its ownership therein is defined by plain well-settled rules of law, and that the legal rights of this defendant and said complainant can be determined by a court of law, and a resort to a court of equity is entirely unnecessary for that purpose.

This defendant is therefore advised, and alleges that said complainant if it is entitled to any of the rights claimed by it in its said bill, has a full, complete, and adequate remedy at law, and its suit for that purpose in equity cannot be maintained, and this defendant claims the benefit of a demurrer to said bill for that reason.

This defendant further says that it is advised, and alleges that no part of the bed of said lake is owned in common by this defendant and either of the other parties to this suit; that the extent and boundary of their respective rights and ownership is limited and defined by law, and that by joining the said Cleveland Iron Mining Company in the same suit with this defendant, the said complainant has exhibited its bill against the defendant and the Cleveland Iron Mining Company for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in
40 any manner interested or concerned, and said bill is therefore altogether multifarious, and this defendant claims the benefit of a demurrer thereto for that reason.

And this defendant therefore prays to be hence dismissed with its reasonable cost by it in this behalf incurred.

[SEAL.] LAKE SUPERIOR IRON COMPANY,
By W. B. BOSSON, *Sec'y.*
W. D. REES, *Treas. and Gen'l Mgr.*

BALL & BALL,
Solicitors and of Counsel for said Lake Superior Iron Company; Business Address, Marquette, Michigan.

41 *Answer of the Cleveland Iron Mining Company.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Marquette. In Chancery.

THE PITTSBURGH & LAKE ANGELINE IRON Company, Complainant, *v.* THE CLEVELAND IRON MINING COMPANY and The Lake Superior Iron Company, Defendants. } Amended Answer.

This defendant, The Cleveland Iron Mining Company, separately answering for itself and not for the other defendant, answers the complainant's bill of complaint in this cause, and says:

I.

It claims errors and insufficiencies in complainant's said bill because of which the same does not make or state a claim upon which complainant is entitled to have any relief, and as to the same prays by this answer the benefit of a demurrer.

II.

It has no reliable or specific information as to the conveyances set forth in paragraph 1 of the bill to which it was not a party and as to the same and the contents thereof leaves complainant to its proof. If any conveyances were made, however, this defendant admits that the original patent was not dated earlier than the year 1851, and that neither said patent nor any subsequent conveyance conveyed anything more than fractional subdivisions. Defendant admits the existence of Lake Angeline at one time as an inland
42 lake containing 170 acres or less, but of the exact quantity of which defendant is not exactly informed; it also admits that said lake at one time was contained within the limits of sections 10, 11 and 15, as stated in said paragraph 1; but defendant denies that the exact location of the same is shown in the map or meander lines set forth in said bill.

III.

Defendant has no accurate information as to the allegations of paragraph 2 of the bill regarding conveyances therein set forth to which it was not a party, and leaves complainant to its proof.

IV.

Defendant admits that the United States Government conveyed, in the year 1850, by patent, to Lorenzo D. Burnell, the east half of section 10 and the west half of section 11, township 47 north, of range 27 west, and it further admits that the title to said two half sections by mesne conveyances came to this defendant and has been held and owned by defendant for more than twenty years; but it denies that said patents conveyed said half sections as fractional; but says on the contrary, that, in said patent by the Government, as set forth in paragraph 3 of the bill, it was the intention of the Government to convey to said Lorenzo D. Burnell the entire east half of section 10, and the entire west half of section 11, described in the bill to the full extent and limits of the section lines of said sections as bounded on the west by the north and south center line of section 10, and on the east by the north and south center line of section 11 and on the south by the south section line of sections 10 and 11 regardless of the meander lines of said Lake Angeline;
43 that it was the intention of both the Government and the grantee under and by the terms of said patent that the patentee should have the full limit of said two half sections as aforesaid; that, at the time the Government owned all remaining land surrounding said Lake Angeline and had the right to convey to said Burnell to the full limits of the lines as aforesaid, the said

two half sections; that the patent did not describe said half sections as fractional, as will appear by such patents when produced and proved as this honorable court shall direct, and all assertions to the contrary in said bill are denied. That this defendant, by the mesne conveyances stated in said bill, obtained all the right and title of said Lorenzo D. Burnell under said patent, and for more than fifteen years has enjoyed the same, and possession of said two half sections to the full limits of the lines thereof as stated. That complainant has recognized the construction of said patent to Lorenzo D. Burnell as claimed by this defendant and for more than fifteen years last past has assented to such construction and ownership by defendant.

V.

This defendant denies each and every the allegations of paragraph 4 of the bill directly or indirectly stating that said Lorenzo D. Burnell and his grantees acquired no title to the territory covered by said inland lake, except on account of riparian ownership of the same, and defendant further denies that the complainant is entitled to any portion of the territory formerly under the waters of said lake north of the south line of section 10.

VI.

44 Defendant has no accurate information as to the conveyances set forth in paragraph 5 of the bill to which it was not a party, and as to such conveyances leaves complainant to its proof, but denies any and all allegations in conflict with its claim hereinbefore stated.

VII.

This defendant admits that there are no other claimants to the lands surrounding said Lake Angeline as it once was, except the parties to this suit, so far as it is informed and as it verily believes, and it admits that the defendant, The Lake Superior Iron Company, has for many years been in possession of the lots (except lot 6) set forth in said bill as having been conveyed to it, and that complainant has for many years been in possession of the lots in section 15 set forth in said bill as having been conveyed to it; but denies any claim of ownership of said lake in complainant based upon its alleged riparian ownership as claimed by it in said bill.

VIII.

Defendant admits that said Lake Angeline was once a meandered lake and was so made by the Government survey, and admits that, for the most part, the meander courses were as stated in paragraph 7 of the bill, but believes the same are not in all cases stated correctly, and so leaves complainant to its proof, but claims that said meander lines have no significance as to the ownership by defendant of the whole of the east half of section 10 and of section 11 as herein set forth.

IX.

45 This defendant admits the pumping out of the waters of said Lake Angeline and draining the same dry by mutual consent of complainant and the two defendants, as alleged in the second subdivision of paragraph 7 of the bill, and says that thereby complainant waived and forfeited its right, if it ever had such right, to claim ownership of any portion of the bed of Lake Angeline based upon the theory or idea of riparian ownership as claimed in said bill, and whereby without other reason complainant is now estopped from making such claim. Defendant further answering says that the pumping and draining of said waters as alleged in complainant's bill was pursuant to a contract in writing signed by complainant and the two defendants, which contract will be produced and proved as this honorable court shall direct, and that thereby complainant agreed with this defendant that the south line of section 10 aforesaid was the boundary line between the property owned by complainant in section 15 and the property owned by this defendant, to wit: the east half of section 10 as well where the said south line passed through the waters of Lake Angeline as they once were as where the same was run upon the upland, whereby complainant is debarred from making any claim to ownership in any part of the bed of said Lake Angeline based solely on shore ownership thereof, as claimed in its said bill and whereby, also, the said section line between 10 and 15, where the same runs for its full length between the east and west limits of said east half of section 10 was fixed and determined between complainant and this defendant as a boundary line between them.

46 That prior to the making of said pumping contract an agreement was made and an understanding had between complainant and this defendant, The Cleveland Iron Mining Company, fixing said section line between sections 10 and 15, as the boundary line between the property of complainant and this defendant, extending such line through the lake; that the said boundary line was so agreed upon and fixed and said understanding entered into to settle the proper location of such boundary and to settle all doubts regarding the same, and that the claim of the defendant then and before such time made that said south line of section 10 extended through the waters of said lake was or should be the true boundary between them, was fully recognized and assented to by complainant; that during many years after such understanding and agreement covering the period of the making of said pumping contract, an application by the three companies to obtain consent of the public authorities to pump said lake and the general conduct of business between complainant and this defendant upon the lands upon either side of said section line, clearly recognized such agreement, and on the faith thereof this defendant and complainant have acted for many years last past, conducted all their business, and expended thousands of dollars in conducting explorations and mining operations on their respective properties.

X.

This defendant denies all the allegations of subdivision 3, of paragraph 7 of the bill, not hereinbefore admitted or denied, or fully answered, and so to the same effect and extent denies the correctness, value and materiality of said map attached to complainant's bill, referred to in said paragraph 7. And this defendant
47 denies all the allegations of the fourth subdivision of paragraph 7 of complainant's bill, not hereinbefore denied, admitted, or fully answered, so far as the same claims any interest in complainant in the territory formerly under the waters of Lake Angeline, north of said section line, between said sections 10 and 15, and denies the right of complainant to have any boundary fixed by this court, because said boundary has already been fixed, both by the patent aforesaid, and by the agreement of complainant aforesaid.

XI.

This defendant neither admits or denies the allegations of paragraph 8, of the bill concerning its codefendant, The Lake Superior Iron Company, because relative thereto it has no information, except incidentally, and not sufficient to enable it to make positive answer thereto, and so leaves complainant to its proof. As to the allegations in said paragraph, relative to this defendant, it admits the claim of ownership to all the east half of section 10, as stated in said paragraph 8, and that it is now exploring for, and has been for many years exploring for iron ore in all said territory, and asserting ownership thereof, for more than 15 years, but denies that in so doing, it has trespassed upon any right, interest of property of the complainant whatsoever. It further says that its explorations for iron ore in said territory, down to the full limits of said section line, between 10 and 15, alleged by complainant, in its said bill, have been conducted for many
48 years with the full knowledge of complainant; that many years ago defendant obtained permission from complainant to erect diamond-drill machinery and appliances upon complainant's territory, south of said section line, between sections 10 and 15, for the purpose of driving drill-holes into territory under the waters of said lake, north of and adjacent to and abutting the said section line, where it passes between the east half of section 10, and the territory of complainant, for the purpose of ascertaining the character of said territory, and discovering, if possible, iron ore therein, belonging to defendant, and which defendant was then claiming as its own exclusive territory, though under the waters of said lake at that time, not yet drained, and within the territory along and north of said section line, now claimed by complainant, and all with the knowledge of complainant, at that time, as to its purpose and claim aforesaid, notwithstanding which complainant gave its consent to the occupation of its said territory, south of said line, for defendant's purpose, and upon defendant's claim, as aforesaid. Defendant fur-

ther says that the said section line, between sections 10 and 15, produced through the waters of said lake, was at the commencement of said exploring operations, and many years before, believed by both complainant and defendant, to be the true boundary line between their respective properties, and was so laid down by both complainant and defendant on the several maps made by them respectively, of their respective properties in the course of many years, and has always been believed and considered, by both complainant and this defendant, to be such true boundary line between their respective properties, until the time of the commencement of this suit.

49 That, subsequently to the drilling explorations conducted from complainant's side of said section line as aforesaid, and during the period of many years last passed, and with the full belief and in reliance upon the said section line being the south boundary line of its said property, defendant has been constantly carrying on drifting, drilling, exploring and mining operations in all said territory in the east half of section 10 down to the very south boundary line formed by said section line, and has erected numerous and expensive structures upon and adjacent to said territory, and has made many valuable improvements in said territory within the limits of said east half of section 10 down to the said section line, and has expended large sums of money thereabout, all with the knowledge, concurrence and approbation of complainant. That large bodies of valuable iron ore have been discovered by defendant by such explorations, lying closely adjacent to said section line between the east half of section 10 and the territory south thereof and within the territory in this suit claimed by complainant, and for several years last past has been expending large sums of money in opening up such deposits and preparing to mine the same, all with the knowledge, concurrence and approbation of the complainant. That the real value of said deposit has, however, only recently and a short time before the commencement of this suit by complainant, been discovered and known. That defendant has also, during the same time, in reliance upon said section line between sections 10 and 15 being its south boundary line as aforesaid, and upon complainant's repeated recognition thereof and assent thereto, and upon the discovery of such ore, entered into engagements and expensive contracts, and made plans for the disposal of such ore so lying north of said section line, the south line of said east half of

50 section 10, but within the territory now claimed by complainant in this suit, a failure of ability to carry out which, in consequence of complainant's establishing its said claim, would cause irreparable injury to this defendant. That, during the several years last past, prior to the commencement of this suit, many agreements and settlements have been had between complainant and this defendant other than and in addition to those mentioned in the foregoing, all of which will be produced and proved as this honorable court shall direct by which said section line as produced east and west through the waters of said lake has been recognized

fixed and assented to by complainant as the true boundary line between the property of the complainant and this defendant, and the complainant has never, until the commencement of this suit, made any other claim or insisted on any other boundary between them.

XII.

This defendant further says that, if there is, or could be, any virtue in the claim of complainant to the ownership of any portion of the bed of said lake north of said section line between said sections 10 and 15 by reason and upon the theory of riparian ownership, then by the theory and by virtue of the same right of shore ownership, this defendant owns, and has owned since the conveyance to it set forth in said bill, several acres, to wit: three acres of the territory formerly under the waters of the said lake adjacent and appurtenant to its shore line thereon south of said section line between the east half of section 10 and said section 15, and extending southwestward to the center of the lake at right angles with the meander line of defendant's upland in the southwest quarter of the southeast
51 quarter of said section 10, as shown on the map attached to complainant's bill; that, nevertheless, while now claiming some interest in said lake by virtue of such shore ownership north of said section line as set forth in said bill, complainant denies to defendant the same right, and during many years last past has entered upon the said territory south of said section line, which being under the waters of said lake and appurtenant to defendant's shore line, in said southwest quarter of the southeast quarter of section 10, would belong to it as aforesaid, and has mined therefrom hundreds of thousands of tons of ore of the very finest quality of iron ore, and has shipped the same to market, depriving the defendant of the benefit and advantage which might be derived from marketing such fine quality of ore and has received for its own use and benefit the proceeds thereof, and has not offered and does not offer to account to defendant therefor, and defendant has no certain means of ascertaining the exact quantity of ore thus mined by complainant from such territory.

XIII.

Defendant further answering says that even from the theory adopted by complainant of the ownership of the territory in the bed of said lake, by virtue of the shore ownership, the lines drawn upon said map attached to its bill for the purpose of showing ownership in itself of the territory once under said lake are incorrect; that complainant by the rule it invokes cannot have riparian ownership adjacent and appurtenant to the shore line of defendant and deprive defendant of ownership of the bed of the lake appurtenant to its own shore; that complainant has not by said map offered any guide to the court whatever, for the division of said inland lake.

52 XIV.

This defendant further answering, says that, by both its conduct and its agreements aforesaid, complainant is estopped from making any claim to any territory in the east half of said section 10, formerly under the waters of said lake north of said section line between sections 10 and 15.

That complainant, on its own theory, has not done equity to defendant and cannot have relief; that, if, nevertheless, complainant is entitled to any relief whatever under its said bill, the defendant is entitled to territory south of said section line hereinbefore described and heretofore occupied and used by complainant and defendant is entitled to the same and to all proceeds, benefits and emoluments of every kind whatsoever received by complainant therefrom, or by its use thereof, but this defendant submits thereabout that, by the conduct of complainant, it cannot have adequate relief against said complainant upon the theory set forth in said bill, even though it be awarded thereby the territory south of said section line hereinbefore set forth, unless a penalty should be imposed upon complainant for depriving this defendant of the right and means of determining for itself the value of its property so taken by complainant.

XV.

Defendant further says that said complainant, by reason of its repeated recognition of the south line of said section 10, and the south line of said section 11, as the boundary line of division between the properties of said complainant and said defendant, and by reason of its acquiescence, and its repeated acts of acquiescence,

53 in the fixing and establishing of said line as the boundary line of division, as aforesaid, of said property of said defendant and the property of said complainant, has ratified the adoption and fixing said line as the division and boundary line between said properties.

XVI.

Defendant further says that said complainant, by repeatedly recognizing said line as the division and boundary line between said properties, and by its failure for many years to assert any rights north of said line, and by permitting said defendant to expend large sums of money, and make large improvements in and about said territory north of said line, and without protest to enter into numerous contracts, relating to the mining of iron ore therefrom, and by its failure for a long period of years to assert any rights as against said defendant in and to said territory lying north of said line, has been guilty of laches, and is not entitled to any equitable relief by reason thereof.

And defendant says complainant is not entitled to the relief or any relief, as prayed for in its said bill, and prays to be hence dis-

missed with its proper costs and charges by it in this behalf expended.

THE CLEVELAND IRON MINING COMPANY,
By M. M. DUNCAN, *Agent.*

HAYDEN & YOUNG,
Solicitors for Defendant The Cleveland Iron Mining Company.

Address: Ishpeming, Michigan.

JAMES H. HOYT, *Of Counsel.*

General replications were filed to these answers.

54 STATE OF MICHIGAN:

In the Circuit Court for the County of Marquette. In Chancery.

PITTSBURGH & LAKE ANGELINE IRON COMPANY
v.
CLEVELAND IRON MINING COMPANY and LAKE SUPERIOR IRON COMPANY. } June 17th, 1897.

Present: John W. Stone, circuit judge.

Appearances.

Clark & Pearl, Alfred Russell, of counsel, for complainant.
Hayden & Young; Hoyt, Dustin & Kelly, of counsel, for defendant Cleveland Iron Mining Co.
Ball & Ball, Benton Hanchett, of counsel, for defendant Lake Superior Iron Co.

Complainant offered in evidence a certified copy of a United States patent to John Burt, dated February 10th, 1854, being for lot 5 of section 15, township 47 N., range 27 W., certified by the Commissioner of the United States General Land Office at Washington, marked Exhibit A. Said patent was in due form and properly certified, and showed that the lot in question contained 38.90 acres; and that the same was conveyed to the said Burt upon the said 10th of February, 1854.

55 Complainant offered in evidence the record of a warranty deed from John Burt and wife to Harriet Sherwood, dated April 16th, 1860, of said lot 5 in section 15, township 47 N., range 27 W., as recorded in Liber C of Deeds, page 353, in the office of the register of deeds for the county of Marquette, Michigan, showing a due conveyance of the said lot 5 to the said Sherwood at said date.

Complainant offered in evidence a power of attorney, dated August 13th, 1864, from said Harriet Sherwood to Merrill B. Sherwood, her husband, as recorded in Liber F of Deeds, page 20, in said office, in the county of Marquette, Mich., authorizing said

Merrill B. Sherwood to sell the northwest quarter of the northwest quarter of section 15, township 47 N., range 27 W., which covered the said lot 5 above mentioned.

Complainant also offered in evidence the record of a warranty deed, dated August 13th, 1864, from Harriet Sherwood and her husband, Merrrill B. Sherwood, to James Laughlin and George E. Hall of said lot 5, section 15, township 47 N., range 27 W., as recorded in Liber F of Deeds in said office in said county, page 21.

Complainant also offered in evidence the record of a patent from the United States Government to William Pettit, as recorded in Liber B of Deeds in said office in Marquette county, page 256, and being for the conveyance of lots 3 and 4 of section 15, township 47 N., range 27 W.; said patent being dated the 15th of October, 1852.

Complainant next offered in evidence a certified copy of the will of William Pettit, dated the 22d day of August, 1850, and the modification thereof by codicil dated the 23d of August, 1853, which showed the appointment of Passmore Williamson and R. Franklin Raley, as executors of his last will and testament. Also

56 the record of the probate of the said will in the court of common pleas of the county of Philadelphia, State of Pennsylvania; and showing that said will and the due probate thereof *was* duly certified by the said court of Pennsylvania to the probate court of Marquette county, Michigan, showing a proper probation of said will in said State of Pennsylvania, marked "Exhibit B."

Complainant also offered in evidence the petition of Matthew H. Maynard to the probate court of Marquette county, Mich., dated July 26th, 1869, petitioning for the ancillary probation of the will of William Pettit in the said court, and also offered in evidence all the proceedings of the said probate court of Marquette county, showing that the said will of William Pettit was duly probated in the said probate court for the county of Marquette on the 23rd day of August, 1869; and said will showed that Jane R. Pettit, the wife of the said William Pettit, and Elizabeth P. Allen, the daughter of the said William Pettit, were the sole heirs and devisees of the said William Pettit under the said will, which had been duly admitted to probate in the county of Philadelphia in the State of Pennsylvania, and which was also duly admitted to probate in the county of Marquette and State of Michigan; said will and the probate thereof showing that the title to the property of the said William Pettit passed to the said Jane R. Pettit, his wife, and Elizabeth P. Allen, his daughter, by the said will and the probate thereof; and also showing that said Passmore Williamson and R. Franklin Raley were the sole executors of the said last will and testament of the said William Pettit, and that the said executors duly qualified and entered upon the execution of their trust as said executors of the said will of said William Pettit.

57 Complainant offered in evidence the record of a warranty deed executed by Passmore Williamson and R. Franklin Raley, as executors of the last will and testament of William

Pettit, uniting in said deed with Jane R. Pettit, the wife of the said William Pettit, and Elizabeth P. Allen, the daughter of the said William Pettit, and Charles M. Allen, the husband of the said Elizabeth P. Allen, as sole executors and heirs of the said William Pettit, to Francis N. Buck, of lots 3 and 4 of section 15, township 47 N., range 27 W., by deed dated January 31st, 1856, recorded in Liber B of Deeds, page 259, of the register of deeds of Marquette county, Mich.

Complainant also offered in evidence the record of a warranty deed from Francis N. Buck and Jane E. Buck, his wife, dated August 24th, 1863, which duly conveyed to George E. Hall lots 3 and 4 of section 15, township 47 N., range 27 W., which deed is recorded in Liber D of Deeds in said office in said county on page 256.

Complainant next offered in evidence the record of a warranty deed from James Laughlin and wife, and George E. Hall and wife, to the Pittsburgh & Lake Angeline Iron Company, conveying lots 3, 4 and 5 of section 15, township 47 N., range 27 W.; said deed being dated September 30th, 1865, and recorded in Liber F of Deeds in said office in said county, on page 513.

Complainant next offered in evidence the record of a warranty deed from the Lake Superior Iron Company to the Pittsburgh & Lake Angeline Iron Company, dated July 10th, 1867, recorded in Liber H of Deeds in said office in said county, on page 601; being a conveyance of the surface of lot 6 in the south half of section 10, township 47 N., range 27 W.

Complainant's counsel called attention to the grant of lands by the United States Government under act of June 3 1, 1856, to
58 the State of Michigan, to aid in the construction of railroads, and to the grant made to the Bay de Noquet & Marquette railroad by the State of Michigan from the said lands; which grant included lot 2 of section 15, township 47 N., range 27 W., as certified to the said Bay de Noquet & Marquette Railway Company.

Complainant's counsel then offered in evidence the contract between the Bay de Noquet & Marquette Railroad Company and George E. Hall, for the sale of various lands, including lot 2 of section 15, township 47 N., range 27 W.; which contract was dated the 30th day of July, 1863, and was recorded in Liber M of Deeds, page 584, in said office in said county; which contract was assigned by the said George E. Hall, on the 30th day of September, 1865, to The Pittsburgh & Lake Angeline Iron Company, complainant. Said assignment was recorded in Liber M of Deeds, in said office in said county, on page 584.

Complainant offered in evidence the record of a deed from the Bay de Noquet & Marquette Railway Company to the Pittsburgh & Lake Angeline Iron Company, dated July 10th, 1867, recorded in Liber H of Deeds in said office in said county, on page 599, conveying said lot 2, and the east half of the northeast quarter of section 15, township 47 north, range 27 W.

As to the title of the Lake Superior Iron Company, complainant offered in evidence the record of a patent from the United States Government to Isaiah Briggs, dated December 1st, 1851, conveying

lots 4, 5 and 6, and the northwest quarter of fractional southwest quarter of section 10, township 47 N., range 27 W., recorded in Liber A of Deeds, in said office in said county, on page 40.

Complainant also offered in evidence the record of a deed
59 from Isaiah Briggs and wife to John Burt, dated May 2d, 1851, conveying an undivided half of lots 4, 5 and 6 and of the northwest quarter of the southwest quarter of section 10, township 47 N., range 27 W., recorded in Liber A of Deeds, in said office, in said county, on page 41.

Complainant also offered in evidence a conveyance from Isaiah Briggs and wife to John Burt, dated October 11th, 1851, conveying the balance of their title in the southwest quarter of section 10, township 47 N., range 27 W., covering said lots 4, 5 and 6; which deed is recorded in Liber A of Deeds in said office in said county, on page 43.

Complainant also offered in evidence the record of a deed from John Burt and wife to Heman B. Ely, dated May 3d, 1853, recorded May 12th, 1853, in Liber A of Deeds, in said office in said county, on page 83; conveying all of said lots 4, 5 and 6 in said section 10, township 47 N., range 27 W.

Also offered in evidence a conveyance by Heman B. Ely to Lake Superior Iron Company, dated May 3d, 1853, conveying lots 4, 5 and 6 and the northwest quarter of the southwest quarter of section 10, township 47 N. range 27 W., recorded May 13th, 1853, in Liber A of Deeds in said office in said county, on page 86.

As to the title of The Cleveland Iron Mining Company, defendant, complainant offered in evidence the record of a patent recorded in the office of the register of deeds of said Marquette county, executed by the United States Government to Lorenzo D. Burnell, dated July 2, 1850, containing the following description of the land conveyed: "The east half of section 10, and the west half of section 11, in township 47, N. of range 27 W. containing five hundred and fifty-five acres and fifteen-hundredths of an acre, according
60 to the official plat of the United States Government;" said deed was recorded in Liber A of Deeds in said office of said county on page 20, on the eleventh day of June, 1852.

Complainant also offered in evidence the record of a deed from Lorenzo D. Burnell to Morgan L. Hewitt, dated August 29th, 1850, recorded in Liber A of Deeds in said office in said county on page 22, conveying all his interest above described to said Hewitt.

Complainant also offered in evidence the record of a deed from Morgan L. Hewitt, trustee, to the Cleveland Iron Mining Company, dated May 5th, 1853, recorded in Liber A of Deeds in said office in Marquette county on page 111, conveying said lands so conveyed to him by said Burnell to said company.

Complainant also offered in evidence the record of a quitclaim deed from the Lake Superior Iron Company to the Cleveland Iron Mining Company, dated June 27th, 1888, quitclaiming that portion of section 10, township 47 N. range 27 W. lying east of the north and south center line of said section 10; which deed is recorded in Liber 18 of Deeds in said office in said county, on page 160.

Complainant offered in evidence the record of township 47 N., range 27 W., appearing in the office of the register of the Marquette United States land office, in the official plats of the Government, contained in said office, as "Exhibit C," being a map of the said township.

A copy of said map is hereto attached and marked Complainant's "Exhibit C."

(Here follows diagram marked p. 61.)

62 Complainant also offered in evidence a second map, on a larger scale, from the records of the Marquette United States land office, of the said township 47 N. range 27 W. as "Exhibit D" which is hereto attached. A copy of said map, sufficient to show the south half of sections 10 and 11, and the north half of section 15, showing said lots fronting thereon, with their acreage, is as follows:

(Here follows diagram marked p. 63.)

64 Complainant also offered in evidence certified copies of both of said township maps above referred to, and also offered in evidence the original records of the same from the Marquette United States land office, and which were as above set forth. And Peter Primeau, the register of the said land office, was sworn as a witness, and testified that said certified copies were true copies of the originals, which he produced, and had been carefully compared by himself.

Complainant also offered in evidence a certified copy of the field-notes of the Government of the meander courses and distances of said lake, as appearing in the office of the Commissioner of the General Land Office at Washington, D. C., certified to by the Commissioner of the General Land Office. Said field-notes so certified to by the Commissioner of the General Land Office agreed with the field-notes appearing upon the margin of the said map, Exhibit E, in the Marquette United States land office, and are as follows:

T. 47 N., R. 27 W. Meridian michigan.

Courses.	Chs. Lks.	Remarks.
		* * * * *
		Meanders of lake in sections 10, 11, and 15 beginning at post on S. side of lake between sections 10 and 11, thence

N. 77 E.....	4.00	In section 11
S. 75 E.....	7.00	
East.....	1.50	
North.....	3.00	
N. 65 W.....	5.00	
N. 50 W.....	5.00	
N. 80 W.....	3.78	To line of section- 10 and 11, thence

65

N. 80 W.....	6.00	In section 10
West.....	6.50	
N. 35 W.....	5.00	
N. 45 W.....	5.00	
N. 40 W.....	6.00	
N. 60 W.....	10.50	
West.....	11.00	
S. 58 W.....	9.50	
S. 20 W.....	10.00	
S. 10 E.....	6.00	
S. 80 W.....	10.50	
S. 55 W.	7.00	A stream 15 links wide course W. to
S. 10 W.....	3.50	line of sections 10 and 15, thence
S. 81 E.....	2.00	

S. 70 E.....	6.00	In section 15
East.....	3.00	
S. 35 E.....	4.00	
N. 75 E.....	3.50	
N. 62 E	9.50	To line of section- 10 and 15, thence

N. 80 E.....	3.60	In section 10
S. 78 E.....	3.20	To line of section- 10 and 15, thence

S. 60 E.....	11.00	In section 15
S. 75 E.....	10.00	
East.....	4.00	
N. 70 E.....	3.50	
North.....	3.00	
N. 75 W.....	8.00	
N. 45 W.....	2.65	To line of section- 10 and 15, thence

N. 45 W.....	3.00	In section 10
N. 20 E.....	2.00	
N. 76 E	6.75	
S. 60 E.....	7.50	
East.....	5.00	
N. 75 E.....	5.30	To place of beginning. June 4th.

(Here follows map marked p. 66.)

67 E. F. BRADT, sworn as a witness for the complainant, testified as follows:

Direct examination by Mr. CLARK:

I reside in Ishpeming. Am a land surveyor, civil engineer, as well as mining engineer. Have been in the employ of the complainant as mining engineer for eight years and three months. I prepared the map attached to the bill of complaint. Before making that map, I had in my possession the map of township 47 N., range 27 W., with the meander notes upon it, and which is the one that has been offered in evidence. I made a map of Lake Angeline. I got the data from which to make it from the field-notes and from the map; and Exhibit A attached to the bill of complaint is a correct map of those meander lines. Exhibit A of the bill of complaint contains a portion of the south half of section 10. The balance of the lake is located upon sections 11 and 15.

I have prepared a further map, showing the entire lake, made from the meander courses and distances, to which I have referred. It is the map which you now show me. It covers territory, in addition to that covered by Exhibit A attached to the bill of complaint, a portion of the southwest quarter of the southwest quarter of section 11, and the lines are extended as to section 15 south of section 10, and the map covers all the boundaries and surrounding lots of Lake Angeline in sections 10, 11 and 15.

In making this map as well as Exhibit A of the bill of complaint, I started the platting of the meander lines on the section line between sections 10 and 11, starting from meander corner number 11. We found that Government meander corner. I found what appeared to be the bearing trees, or the stumps of the bearing trees of that corner; and from my experience as a surveyor in look-
68 ing up section corners, quarter posts and meander corners, would say it was the meander corner. It was located 3 chains and 38-hundredths of a chain north of the corner where sections 10, 11, 14 and 15 corner together. After taking this meander corner as the starting point, in platting this map, I started with the course north 77 degrees east 4 chains.

The witness then states the courses and distances as platted to be the same as the courses and distances of the Government meander lines above set forth.

Q. Now in making this platting, what can you say as to whether you used care and accuracy in making this map?

A. I did.

Q. From the starting point that you have stated on the east line of section 10?

A. Yes, sir.

Q. And this map that is Exhibit A in the bill of complaint, and this map which we are now looking at, was the result of that platting?

A. Yes, sir.

Q. Now did you mark on the south line of sec. 10 the different meander corners as shown by these minutes of the survey of the Government?

A. Yes, sir.

Q. I ask you to look at meander corner number 13, as you have marked it upon this map on the south line of section 10, and I ask you to also look at meander corner number 14 as you have marked it upon the map on the south line of 10, just north of lot 4, section 15, township 47 N., range 27 W.; now looking at the meander post number 14 as located by you, I ask you if you placed upon the map a dotted line to a point marked "center" on the map which I have before me?

A. Yes, sir.

Mr. HOYT: Objected to as leading.

Q. State what was the course of that line and the distance?

A. North 26 degrees and 55 minutes east 14.58 chains.

Q. You say you platted that line on the map "Exhibit A"?

A. Yes, sir.

69 Q. Now from the end of that line, which we will call, for the purpose of convenience, "center," did you run a line in a southwesterly direction therefrom, that is, did you plat a line which is marked as a dotted line on "Exhibit A"?

A. Yes, sir.

Q. And what was the course of that line?

A. South 66 degrees and 16 minutes west.

Q. And to what point did it reach?

A. Meander corner number 13, 32.29 chains.

Q. Now what can you say as to whether the two dotted lines you have just referred to and the south line of section 10, between meander corners 13 and 14, and that portion of that section line, enclose a territory appearing to be an obtuse-angle triangle?

Objected to as irrelevant.

A. Yes, sir.

Q. Now can you give us the area that lies between and surrounded by the section line between meander corners 13 and 14 and the dotted line you have referred to north 26 degrees 55 minutes east 14.58 chains, and the lines south 66 degrees and 16 minutes west 32.29 chains, give me the acreage?

Objected to as irrelevant.

A. 14.92 of an acre.

Q. Now referring to the point on the map marked meander corner number 15 on the south line of section 10, and to the dotted line therefrom to the convex point of the other two former dotted lines which we call center, I ask you if you mapped a dotted line from this corner 15 and that point referred to as center?

Same objection.

A. Yes, sir.

Q. What was the course and distance?

A. South 2 degrees 37 minutes west 12.34 chains.

70 Q. And from the termination of that line at the point we refer to as center, did you run a line in a southeasterly direction?

A. I ran it the other way.

Q. You started at what corner running that corner dotted line?

A. Meander corner 16.

Q. And ran it what course and distance?

A. North 51 degrees and 49 minutes west 20.75 chains.

Q. Now what acreage is surrounded by those two last dotted lines described and the portion of the south line of section 10 lying between meander corners 15 and 16?

Same objection.

A. 10.84 acres.

Q. Now you say a portion of Lake Angeline is located in lots 4 and 5, section 15, township 47 N., range 27 W., south of the south line of section 10, do you?

—. Yes, sir.

Q. Have you figured the acreage that would be included between the portion lying south of the south line in section 10 between meander corners 13 and 14 and surrounded by the south meander line platted by courses and distances as you have referred to?

Same objection.

A. Yes, sir.

Q. What acreage is it?

A. 5.57 acres.

Q. Now, referring to the meander corners 15 and 16, I ask you whether you have determined the acreage lying between the south line of 10 between those two last-named meander corners and surrounded by meander line south of that section line on lots 2 and 3 of section 15?

Same objection.

A. Yes, sir.

Q. What did you find it to be?

A. 12.50 acres.

71 Q. And what did you make the total of the four amounts of acreage which you have given us in these last four enclosures described?

A. 43.83 acres.

—. Now have you estimated the territory lying north of lot number six and between the two dotted lines north 26 degrees and 55 minutes east 14.58 chains and south 2 degrees and 37 minutes west 12.84 chains?

(Same objection.)

A. Yes, sir.

Q. And bounded on the south by the meander line lying north of lot 6?

A. Yes, sir.

Q. What did you make that acreage to be?

A. 4.05 acres.

Mr. CLARK: That was the territory deeded to the Lake Superior Iron Company, reserving the mineral.

Mr. CLARK: We now call your attention to the dotted line running from meander corner 13 to the point we have referred to as center running south 66 degrees and 16 minutes west, and ask you if from the end of that line we have referred to as center you have mapped any course and measured the distance with your platting from this point marked center to the north meander line of the lake and the meander line called west 11 chains?

A. I mapped the course but I didn't the distance.

Q. And the course is what?

A. North 4 degrees 41 minutes west.

Q. I mean to a point where the center line of 10 intersects the north meander line of the lake?

A. Yes, sir.

Q. You did that?

A. Yes, sir.

Q. Now have you figured the territory that lies between the last-named dotted line and the dotted line?

A. I did know it at that time, but have forgotten it now.

Q. Then you knew that distance when you computed the area enclosed did you?

A. Yes, sir.

72 Q. Now taking the area between this last-named dotted line running from the north and south center line of 10; and the line from the point called center which runs south 66 degrees 16 minutes west 32.29 chains; and the meander courses and distances lying between the meander corner number 13 and the point of intersection of the north meander line of the lake and the center line of 10; have you figured the area between those three?

(Same objection.)

A. Yes, sir.

Q. And what did you find the amount to be?

A. 32.05 acres.

Q. And have you marked upon the map which I now have cor-

rectly those quantities as you have previously figured them and as you have given them within the enclosures as stated?

A. Yes, sir.

Q. Now I call your attention to the meander corner number 16 and to the dotted line which you have referred to, from that point to the point called center and described as north 51 degrees 49 minutes west 20.75 chains, and ask you if you have figured the area lying between that line; and the dotted line from the point called center, to the intersection of the north meander line of the lake and the north and south center line of 10; and the meander courses and distances from that intersection in a southeasterly direction around the lake lying southeast back to the meander corner 16?

(Same objection.)

A. Yes, sir.

Q. And what do you find the area to be of that enclosure?

A. 68.68 acres.

73 Q. Now have you figured the territory lying between the line from the point referred to as center and the intersection of the north meander line of the lake with the center line of 10; and the center line of 10 as projected from that intersection down to the line marked south 66 degrees and 16 minutes west between those two lines and said last-named line?

A. I have figured it up but I don't recall it.

Q. Will you mark it out on this map?

A. I will.

Q. Have you got here the statement of the amount?

A. I am not sure that I have, but I will figure it and put it in there.

Q. Now then, have you figured up the total distance of frontage according to the meander lines of the Pittsburgh and Lake Angeline on lots 2, 3, 4 and 5 of section 15, township 47 N., range 27 W.?

A. Yes, sir.

Q. And what do you make the total frontage?

(Same objection.)

A. 68.15 chains.

Q. Lying between meander corner 13 and meander corner 16 and the territory of the lake meandered south of the south line of section 10?

A. Yes, sir.

Q. That is what it is?

A. Yes, sir.

Q. Now I ask you if you have figured the total frontage of the Lake Superior Iron Company lying between meander corner number 13 around in a northeasterly way by the meander courses and distances to the intersection of the north meander line of the lake and the north and south center line of section 10. Q. Have you figured that out?

A. Yes, sir; 56.58 chains.

Q. You figured it from this platting according to the courses and distances of the Government referred to?

A. Yes, sir.

Q. Have you figured the frontage of the Cleveland Iron
74 Mining Company from the intersection of the north meander line of the lake intersected by the north and south center line of 10 in a southeasterly direction around to meander corner number 16?

A. Yes, sir.

Q. What is the total?

A. 107.55 chains.

Q. Now I ask you what you figured to be the total acreage of the lake within the meander lines?

A. 148.60 acres.

Q. And what do you find to be according to the acreage figured the relative percentage of the Pittsburgh & Lake Angeline Company, according to those lines of division just marked out and referred to and enclosed as you have stated?

A. 29.49 per cent.

Q. Of this 148.60 acres?

A. Yes, sir.

Q. And what per cent. do you find to be the share of the Lake Superior Iron Company according to the enclosures referred to and the estimates made?

A. 23.69 per cent.

Q. And what do you find to be the proportion of the Cleveland Iron Mining Company by the same mode of estimation?

A. 46.82 per cent.

Q. Of this 148.60 acres?

A. Yes, sir.

Q. What do you find to be the total frontage of the entire lake by the meander courses and distances?

A. 232.28 chains.

Q. And by the estimates you have already given what is the proportion of frontage of the Pittsburgh and Lake Angeline, what per cent. of the entire frontage?

A. 29.34.

Q. And of the Lake Superior Iron Company?

A. 24.36.

Q. And of the Cleveland Iron Mining Company?

A. 46.30.

Mr. CLARK: We now offer in evidence this map which I have here as Complainant's Exhibit F. A copy of which is hereto attached and marked Exhibit F.

(Here follows map marked p. 75.)

76 Map objected to as incompetent and irrelevant.

The witness further testified:

I have marked the percentages which I have referred to on the

margin of this map. Since I have been in the employ of the Lake Angeline Iron Company as mining engineer, it has been in the business of mining iron ore on lots 2, 3, 4 and 5 of section 15. My duties as engineer are to make surveys of the workings, and to lay out work to be done, and figure up what has been done; and estimate the quantities of ore removed, if necessary. That is sometimes necessary.

The Cleveland Iron Mining Company is engaged in mining along that lake. Its shaft is located on the northeast shore of the lake, on lot 2 of section 10. It is marked on this map I have just referred to as "shaft-house," with a square to show it. I have been in that shaft. It slopes to the southwest, at an angle of 50 degrees from horizontal, as I recollect it. I have been a portion of the way through the workings of the mine to which that shaft goes. There is a drift from the bottom of that shaft through and into the territory under the lake, and to the south side of the lake within this disputed territory referred to in this case, so that you can go from the Cleveland Iron Mining Company's shaft through under the lake to near the south side of the lake. There is some diorite rock in that drift under the lake. About 640 feet of the drift is in diorite, which runs from ore body to ore body. There is a fold or upheaval of diorite in under the lake that divides the north body from the south body of ore. The diorite might be considered as forming a dividing line between the two deposits; it might be so considered.

77 I noticed the quality of the ore lying south of the diorite division of which I speak, where the drift goes into the ore at the south of the diorite. After passing through this diorite drift the length I have stated, the drift comes into iron ore. It is regarded first-class. I have been there long enough to have a judgment of the qualities of the ore.

Q. Can you state whether this drift from the north body of ore through the diorite as you have stated as about 640 feet, whether that drift in the diorite reached about to where the dotted line from meander corner 16 to the point marked center north 51 degrees and 49 minutes west would come under the lake, about where that line would run?

A. It goes farther, probably 100 feet.

Mr. HAYDEN: Do you mean the rock drift would cross that before it struck the ore?

A. Yes, sir; I should think so.

Mr. CLARK: Now were there any side drifts from the main cross-drifts after you got near to the end of the diorite drift?

A. Yes, sir; in a westerly course.

A drift was driven there about 400 feet. It was about 300 feet in diorite after it left the main drift, before it struck the ore. This drift is in a westerly direction, and is laid down on this map (Exhibit F) that has just been offered in evidence, about as it is located; and it would be the north drift marked down here on the map as running in a westerly direction. From the point where this drift branched off from the main drift in the diorite, the main drift extended about 100 feet before it struck the ore, from the dotted line.

This main drift was continued down to the south line of section 10, and other side drifts were put in, all in ore I believe, that is to my best recollection. I have been in there I should think about eight or ten times, with the officers of the Cleveland Iron Mining Company, their mining engineer, James Jopling, and their mine
78 captain, Captain Buzzo. He was the captain in charge of the work. The understanding between the engineers in these mines was that there should be an interchange of maps between them. I have got the map of the Cleveland Iron Mining Company's workings furnished me by that company; and they also have the map of the workings of the Lake Angeline Company.

Witness produces the map of the Cleveland Iron Mining Company's workings.

This blue print which I show you is one of the maps furnished me by Mr. Jopling, the engineer of the underground working referred to, in the Cleveland mine (Exhibit G). The Pittsburgh & Lake Angeline Iron Company's shaft-house is marked on this map located on the south shore of Lake Angeline. The line running east and west on its margin from quarter post with the form of the building marked "engine-house," is the south line of section 10; and all below that is section 15. To the north of it is section 10. The workings of the Cleveland Iron Mining Company lie to the northwest, as shown on its map, from the shaft of the Pittsburgh & Lake Angeline Iron Company; and the workings lying to the south of our shaft on section 15 are the workings of the Pittsburgh & Lake Angeline Iron Company south of the south line of section 10. This drift here on the map that comes off here from the north, a long drift, is the one that comes down through the diorite that I have described, from the shaft of the Cleveland Iron Mining Company on the north side of the lake.

This map that I received from James Jopling is dated December, 1895; I believe that is about the time that I received it; and I believe it shows the workings north of the south line of 10,
79 as shown by the map at that date. I am confident that I was in the mine before that date. I do not remember when the Cleveland Iron Mining Company began mining ore, after they got through the drift, from the north of the lake, through the diorite into the south formation of ore. I believe it was in 1895—that is, when they began taking out ore; and as I understand it from this map of December, 1895, this main drift and these side drifts east and west had been driven at that date. I have received other maps from Mr. Jopling with regard to other workings since that time.

Complainant offered in evidence the map above referred to and described of the workings of the Cleveland Iron Mining Company and it was marked "Exhibit G;" a copy of which is hereto attached and marked "Exhibit G."

(Here follows map marked p. 80.)

81 These workings that are south of the south line of section 10 are the workings of the Pittsburgh & Lake Angeline Iron Company at the date on the map, 1895.

Witness produces further blue-print map, and states: This blue print headed "220 feet sub-level" is the map that was furnished me by Mr Jopling, engineer of the Cleveland Iron Mining Company. It was furnished January 22d, 1896, I think. This map offered afterwards as "Exhibit H." The crooked lines marked here on this map are the outline of the workings of the Cleveland Company, that is, those lines lying north of the south line of section 10. About the time that I received this map, I was in the workings of the Cleveland Company north of the south line of section 10. I was in there eight or ten times during the time the work was being carried on, for the purpose of examining the mine. Mr. Jopling furnished me this map, that we, each of us, might keep track of the other's working. The Lake Angeline was working right up to the south line of section 10; and the Cleveland Company was doing the same. In fact they were both working on the same lenses, or formations of ore. The iron ore north of the south line of 10 was of the very best grade ore, that would probably average 64 per cent. iron and better, and below .040 in phosphorus. It was of the best Bessemer ore quality.

Q. Can you, from your examinations of the workings of the Cleveland Iron Mining Company, give us an estimate of the quantity of iron ore of this good quality that has been taken out by the Cleveland Company from this south working north of the south line of 10, and south of the diorite division that has been described?

(Objected to as incompetent and irrelevant.)

82 A. I should estimate 120,000 tons. As engineer, in making surveys, I surveyed the drifts and the stopes, and estimated the quantity of ore taken out in the Pittsburgh & Lake Angeline Company's mining work. In doing that work for the years that I have been employed, I have become experienced in that matter. I have been accustomed to doing this kind of work for eight years.

Q. Now state whether, as I have asked you, by such examinations during that length of time, you are able from examining, without measuring, to form an estimate of the quantity of ore taken out of a given territory?

A. Yes, sir. And I make the statement as to quantity of ore taken from my knowledge thus acquired. I have also become accustomed from my engineering duties, to form an idea of the cost of mining of a given quality of ore, and of this quality in this south formation, this soft ore, its cost per ton. It is a part of my duty, examining those things.

Q. What would you say, during the last three years say, on the average, would be the cost of mining that ore and putting it into the skip and hoisting it to the surface, per ton?

(Same objection.)

A. Not including surface?

Q. Not referring to any outside expense of taxes or anything of that kind?

A. 60 cents a ton.

Q. Would that be a conservative estimate?

A. I should consider it so.

Aside from the expense of taking the ore to the surface, there would be chargeable against the ore as a part of its cost, when ready to be shipped from the mine, its portion of the general expenses of the mine, such as office force, agents, taxes and all other ex-
83 penses combined with the mine; expenses outside of the mining, and referred to under the estimate of sixty cents.

Q. Have you any way yourself to state what would be the total, including the sixty cents, of the cost of the ore on the surface, covering all of those additional expenses you have referred to?

(Same objection.)

A. About $1.10 a ton.

Q. From your personal knowledge of the expenses outside of the actual mining, which you say cost sixty cents, do you make your total estimate of $1.10?

A. Yes, sir.

Q. And would you say that the workings of the territory north of the south line of 10 is correctly shown on this map as it was January 22d, 1896?

A. So nearly as I can transfer it from one map to another. I copied it from the map that Mr. Jopling gave me.

Mr. CLARK: We offer in evidence this map as Exhibit H. (Blue print.) A copy of which is hereto attached and marked Exhibit H.

(Here follows map marked p. 84.)

85 My duties with regard to the mine had nothing to do with the selling of ore; and I know nothing about that part of it.

Q. Now you were asked before dinner to estimate the area of territory between the line running from the point marked center in Exhibit F, north 4 degrees and 45 minutes west, and the line which is the north and south center line of 10, from the dotted line running south 66 degrees and 16 minutes west up to the north meander line of the lake, which is the north meander line which runs west 11 chains, forming the triangle between those lines which I have referred to; what do you make the area of that territory?

(Same objection.)

A. 1.23 acres.

Q. Now, Mr. Bradt, after they had driven the drift through the diorite division there between the north and south ore formation, I ask you, when they struck the ore on the south formation, whether the drifts (the ore that would be taken out of the drift), would pay for driving the drift?

(Same objection.)

A. I should say yes, sir, from my general knowledge of mining, knowing the quality of the ore, and from my experience of the mining work being carried on.

Q. I ask you whether there has been any work down by the Lake Superior Iron Company, south of this dotted line which is marked south 66 degrees and 16 minutes west.

A. They have put in three diamond-drill holes. They were bottomed in diorite. Ore was discovered in one of them, in hole marked on map Exhibit F, as hole number 3, and those numbered on that map and located at the point where the drilling was done. This hole number 3 is about 20 feet south of the line marked on the map as south 66 degrees and 16 minutes west.

86 Cross-examination by Mr. HANCHETT:

Q. Mr. Bradt, will you point out on this map the three drill-holes which you have just referred to as made by the Lake Superior Iron Company, south of the dotted line?

A. Drill-hole number 1, drill-hole number 2, drill-hole number 3. (Pointing them out on the map.)

The WITNESS: I wish to correct my statement; there were two drill-holes that I overlooked; there are two other holes near the corner of the triangle that I overlooked. That covers the whole number of holes that were drilled south of the dotted line and north of the south section line, so far as I know.

I have numbered on this map Exhibit F, drill-holes number 1, 2 and 3. There is no designation on the map of the other two which I overlooked, which I have mentioned.

Q. How near to the section line of section 10 is the drill-hole made nearest to that line?

A. Without actually having measured, I should say about 8 or 10 feet. The other of the five drill-holes is immediately north of it, very nearly so.

Q. And how near to the dotted line?

A. That I don't know exactly; I should say within five or ten feet.

Q Those two holes as they appear on this map stand at the left of the letters "D. D. H.," do they not?

A. Yes, sir; and they can be designated in that way, if you wish.

Q. Let me call your attention a little further to this; are there in there two additional drill-holes, one there and there?

A. Not to my knowledge. There is a hole not included in the line; there is one outside of the dotted line to the north, across the line.

87 Q. Where in respect to the section line and the dotted line is the most southerly drill-hole?

A. That is not a drill-hole; that represents meander corner 13. The complainant has an office near meander corner 13. I do not

know how long that office has been there; to my knowledge, some nine years.

Q. When were these five drill-holes which you have mentioned, and which are marked on this Exhibit F, drilled by the Lake Superior Iron Company south of the dotted line, drilled?

A. Those the farthest west were drilled during the summer of 1896, and I think the others were, two of the others—I am sure that all of them were—I believe they were all drilled in 1896. If not in 1896, it would be in 1895. I was present so as to see the work when it was going on. I knew of the work being done when it was done; I don't know the month or day, but knew of the fact.

Q. What other of the officers, agents or superintendents of the complainant were present at that time, so that they would have observation of the work as it was going on?

A. I presume our agent, Mr. Kidder; and Captain Walters, the superintendent. Captain Walters is the general superintendent of the mining for complainant. Mr. Kidder has general charge of the work. They were in sight of where the work was, at the office, so that they must have known of the work when it was being done.

In making this map, Exhibit F, so as to show the boundaries of the lake, I simply followed the courses and distances of the meander lines as given in the Government minutes. I had nothing to do with the lake itself; simply made a map from the field-notes. This Exhibit F made by me is designed to represent the boundaries of Lake Angeline.

Q. Then you made a map of the lake, didn't you?

88 A. If you wish to so regard it. I regard it as the boundaries laid down by the Government.

Q. Then my question is that your work here is simply making a larger map of Lake Angeline than the Government plat is?

A. If you wish to so regard it.

In making this plat showing the boundaries of the lake, I did not make measurements myself. I did not find meander post at corner number 12. I found meander post number 11—not the post, but the bearing trees. I did not examine thoroughly for the meander post, or any evidence of its location at corner number 12. I did not examine so as to be able to tell whether the evidences are there or not. I found nothing at meander corner number 13. I did not examine thoroughly. I would answer the same as to meander corners number 14, 15, and 16.

Q. Have you taken any measures, by measurements or otherwise, for the purpose of determining whether the meander lines concur with the actual shore line of the lake?

A. Yes, sir. I made this examination on the north side of lot 7 of section 10; I made that examination the entire length from meander corner 16 to meander corner 11. It is impossible for me to tell how much of that distance the meander line varied from the actual shore line. I ran a meander line with my transit, in company with Mr. Cummings. I did not handle a chain.

Q. And you found that the meander line varied from the actual shore of the lake?

A. So far as from our starting point.

Q. Where did you start from?

A. We started where we supposed it to be.

Q. And you found it varied throughout the whole distance?

A. No, sir.

89 Q. How much?

A. One point particularly; the north end of course north 20 degrees east 2 chains; the second course where we assumed it was corner 16.

Q. It varied during that second course?

A. From evidently the original shore of the lake, yes, sir.

Q. Did it vary at any other part of the line?

A. I should say not.

Q. Is that the only portion of the lake where you have made the examination to determine whether the meander line conforms with the actual shore line?

A. No, sir.

Q. Where else did you examine it?

A. The portion in section 11, commencing at meander corner 11, and following around to 12.

Q. What did you find to be the condition there?

A. Looking at the map, I wish to state here that when I ran this line we made a slight error in the course, but not out of the course, and not enough to materially change it from where it apparently should be according to the courses and distances, and the course marked south 75 degrees east 7 chains: the east end of that course seemed to be off from the shore line.

Q. About how much?

A. 40 or fifty feet; from recollection—I beg pardon—that was not the place; that afterwards proved to be right. It was the course north 65 degrees west 5 chains on the north shore, and the following two courses.

Q. Between that and corner 12?

A. Yes, sir.

Q. How much of a variation did you find that?

A. Apparently from two or three acres of land, between what would seem to be the original shore of the lake and the meander lines as we ran them.

Q. That is, there was that quantity of land between the

90 meander line and the actual shore of the lake?

A. I would judge so. I believe we made the examinations one day last week; I don't just recall the day. It was since I made this map. I did not examine any other part of the shore of the lake. The meander line is farther out.

Q. Running these dotted lines, to which your attention has been called by Mr. Clark in your direct examination, has been done simply because he directed you to make such lines?

A. Yes, sir.

Q. He asked you to draw lines as they are drawn here giving the courses and distances, and to compute the areas within those lines?

A. Yes, sir.

Q. You drew those lines because he directed you to do so and computed the area because he requested you to give the area?

A. Yes, sir. Those lines were not actually measured on the ground by me.

Q. They are simply lines on paper that refer to the fact of whether those lines would meet if drawn upon the ground?

A. They will meet. I know it by computation.

Q. You mean to say without going on and putting your chains on the ground they will meet?

A. I do.

Q. At the places from which you actually made your start on the map?

A. Not on the map.

Q. Where would you start then?

A. On the section line.

Q. I don't think you and I understand each other.

A. I don't think we do.

Q. Now, you have drawn a dotted line from meander corner 13 up to what has been described as the center point in the lake, and then you have drawn a dotted line from meander corner 14?

A. Yes, sir.

Q. To the same point?

A. Yes, sir.

Q. Do you know whether those lines as measured from the
91 bed of the lake would correspond in course and distance with what you have given us on the map here?

A. I am satisfied they will, and will meet within a limit of area.

Q. What makes you satisfied in that way?

A. You might ask me why I exist.

COURT: May not the surface of the country have something to do with it?

A. I was explaining to the judge that the courses and distances as shown on the map were not platted for the purpose of starting off from a straight line, as they are so indicated on the map.

Q. Did you make a measurement of the actual distance from meander corner 13 to meander corner 14?

A. No, sir.

Q. From what do you take the distance to be?

A. From what the Government field-notes say them to be.

Q. How did you locate your center point in the lake, what guided you?

A. I refer you to Mr. Clark, our attorney.

Q. What did he tell you to do to find that center point?

A. He didn't tell me to find it; he found it himself.

Q. How did he find it?

A. You will have to ask him.

Q. What did he tell you about that point, what information did he give you?

A. He simply asked me to compute courses and distances that would converge at a point that he selected and designated.

Q. Did he tell you the angle to make?

A. No, sir.

Q. Now, I wish you would give us just what Mr. Clark gave to you as a basis from which you did that work.

A. Mr. Clark located upon the map a point that might be considered the equitable center, and I was, from that point, to compute courses and distances from the section line which would converge or meet at that point.

92 Q. Then did Mr. Clark take his map and his pencil, and say, "Draw your lines from there"?

A. Yes, sir; he did.

Q. If he had moved that center point a little farther to the north or south, would you have drawn your lines accordingly so as to meet that point?

A. Yes, sir.

Q. What would be the result, if taking the actual measurement on the ground between meander corner 13 and meander corner 14, which is the base of that triangle, the distance should vary from the distance given in the Government minutes of the meander line between those points?

A. I don't know.

Q. Your triangle wouldn't be what it is now, would it?

A. I don't know whether it would or not.

Q. If you vary the base of your triangle, the point of the apex of your triangle must necessarily vary?

A. Yes, sir; if it did vary.

Q. When you answered me that you knew the measurement on the ground would correspond to that, you made a mistake?

A. No, sir.

Q. You don't know the distance measured on those two points is correct only as you have assumed it?

A. I certainly do, as I have assumed it. Do you wish to know as the corners actually exist?

Q. Yes.

A. I don't know anything about the corners as they actually exist.

Q. Then you may go upon the ground and not find corner 13 at all?

A. Yes, sir.

Q. And not find corner 14 at all?

A. Yes, sir.

Q. If that be so, your whole triangle may be entirely out of order?

A. It is right in fact, if the corners are as located at the distance recorded.

Q. What I mean is this: If you go with your chain and measure from a point which shall be determined on the ground, say
93 as corner 13 and 14, you may find that the distance is different from those you have acted upon?

A. Yes, sir, if I could find the original corners.

Q. You have stated that you didn't know whether they can be found or not?

A. Yes, sir.

Q. Then it may turn out that if they are found, this location on this map may be erroneous both as to courses and distance?

A. Yes, sir, if you start from those meander corners, if they were found.

Mr. CLARK: We assume the contrary; the Government survey stands correct until the contrary is actually shown.

Cross-examination by Mr. HAYDEN:

Q. I want to ask you, Mr. Bradt, whereabouts that portion of the section of the meander line was, which differed about 50 feet from the shore line.

A. I made the correction afterwards.

Q. Is this the part you stated it?

A. I stated that the course was in section 11, first course.

Q. Is that the place where you said there were two or three acres of land?

A. No, sir.

Q. Where, then, is the place where you said in one of your answers, the meander line was about 50 feet distant from the shore line?

A. The place that I said at the end of the course that varied 50 feet was the course south 75 degrees, east 7 chains; but I afterwards corrected it.

COURT: I understand that to be around near meander corner 12.

A. Corner 12 on the north side.

I did not try to find the meander line in what I have marked lot 3, section 10 at the north limit. I did not attempt to follow
94 that meander line. I did not attempt to follow the meander line on the south part of the lake between meander corners 13 and 14, or any other place on the south part of the lake, except between meander corners 16 and 11.

Q. I want to ask you whether this second course proceeding northward from meander corner 16 did not differ from the shore line?

A. It did. I do not know how much, because I did not measure it. I could not tell positively at that point where the true shore line was, and I don't know that I could now go there and positively determine the difference. I did not go upon the ground anywhere in preparing to make this map Exhibit F, except at meander corner number 11. I had company when I examined corner 11. I examined the corner myself. I understand the minutes made by the Government surveyors. The marks were not to be seen, that is, the original letters. I could see that the stump of one bearing tree was marked, and which apparently was done the same as other bearing trees are marked; but it was so far grown over and covered up that the letters, etc., were not to be seen.

Q. Do you know whether the meander line that you have copied from the Government map corresponds exactly with the location of the meander corners as they actually exist?

A. I don't know anything about that, except at meander corner 11.

I don't know whether any errors were made by the surveyors of the Government in putting upon the map the survey of the meander line as they laid it on the ground.

In fixing this point called center, I was told what was Mr. Clark's purpose in indicating that particular point. All that he stated was, to use it for an equitable center of the lake. I don't recall
95 any other statement about it. He did not make a drawing of any kind in instructing me about the measurement. I did not furnish Mr. Clark the map furnished me by Mr. Jopling, showing the workings of the Cleveland Company, before he explained to me how — draw this map. I did not interview Mr. Clark in Marquette at that time. It was at the Lake Angeline office. He did not examine my maps before giving instructions. He did not make any inquiries of me about the ore. I was not present at any conversation where he made such inquiries from Superintendent Walters, that I can remember. I don't know whether Mr. Walters told him where the ore was.

I am a member of the Michigan Mining Engineers' Association. I have read the book regarding riparian rights. There was no conversation had with Mr. Clark about the propriety of drawing this line from the assumed center, north 51 degrees and 49 minutes west 20.75 chains to meander corner 16. There was no conversation about that. The map Exhibit F was completed within the last few days. I don't recall when I completed the map attached to the bill of complaint Exhibit A. It was completed some time before I should think a year before I had any conversation with Mr. Clark in regard to it. I made it for the purpose of outlining the shore of the lake as given in the Government notes. I was requested to do so by our officers. I don't know as I know exactly for what purpose they had it. I suppose they wanted to use it to submit to some attorney for an opinion regarding that; I don't know. I am not familiar with the whole circumstance. I was simply requested to make a map showing the outline of the lake to conform to the notes, etc. That was about a year before I had a talk with Mr. Clark. I did not at that time make the
96 dotted line to the common center; I do not remember when that was made. It was about the time Mr. Clark and I had this conversation. I do not remember when the suit was commenced. I suppose since the conversation with Mr. Clark. I put the dotted line on there before, if the suit was commenced since. I don't know whether the suit was begun before or since, but I suppose since I had this conversation with Mr. Clark. I believe the conversation with Mr. Clark in response to which those dotted lines were put upon the map Exhibit A was the fore part of last winter. It is just recollection; that is all; I have no knowledge. I cannot remember whether Mr. Kidder was present at the Lake An-

geline office when Mr. Clark was there giving instructions. I do not know who brought Mr. Clark to the Lake Angeline Company's office at that time. There were present, so far as I can recall, Captain Walters, and Mr. Persons, the cashier, and Mr. Clark and myself. I do not remember whether or not some one else was present; I am not sure there was not though. I am not sure whether Mr. Kidder was present or not.

Q. Do I understand you to say that east from this section post, from meander corner 16, this meander line on map F agrees with the shore line eastward from the second course continuing north and west from meander corner 16?

A. North 76 degrees east I should say it agrees very closely, as we tried to relocate them after the making of the map.

Q. Is it true that after trying to locate that meander line along that portion asked about, you found it so difficult to locate it that you made no further attempt in other parts?

A. That was not my reason, no, sir. I don't know anything about the attempt after that.

97 Q. Why did you undertake to relocate this line only upon this arm of the lake, this eastern arm of the lake that you just have been talking about, around as far as meander corner 12?

A. There was no reason other than curiosity to know how it did check up; and I had the time, and that day only.

Q. Meander corner 16 is on the section line is it?

A. Yes, sir, on the south line of section 10.

Q. Mr. Bradt, I indicate with pencil a line running southwesterly from meander corner 16 to about the center of that arm of the lake as shown within the meander lines as you have them on map F, and thence as nearly as possible to the center of that water body between the two meander lines on either side northwesterly to the section line, making a triangle formed by the south section line of 10, and these two pencil marks projected into the apparent water body in that arm, of lot 3 of section 15, and ask you whether the complainant company has conducted any mining operations in that territory?

A. Yes, sir.

Q. What is the extent of the operations conducted there?

Mr. CLARK: You mean the workings just south of the south line of 10 and south of the south workings of the Cleveland Company?

Mr. HOYT: He means where he has marked it.

Mr. CLARK: We object to the manner in which he marks it as incompetent.

A. Yes, sir.

Mr. HAYDEN: To what extent?

A. Of removing all the ore there down to the second ore level, 209 feet below the surface I believe.

Q. What extent of territory is comprised within that triangle?

Mr. CLARK: Objected to as incompetent.

98 A. I cannot tell you.

Q. What kind of ore has been taken out of there by the complainant company?

A. What is known as first-class ore, best grade of ore. I am unable to state how many tons. I have maps of that territory. I think I have them with me; if not I can procure them, and will do so.

Q. Has this portion of the mine of the complainant company included within this triangle been caved in?

A. From the surface down?

Q. Yes, sir.

A. Not from the very surface down. On top it has been; the hanging portion over the ore has caved in; I don't know what portions of the hanging over the ore has caved in.

Q. Has any portion of the ground or ore taken out leaving the open stopes or levels there been filled in by complainant?

A. Yes, sir, by dumping rock from the surface through a raise into an opening made by the taking out of the ore. I do not think you can go into that portion of complainant's mine, because a large portion of it has been filled up, and the remaining portions are unsafe to enter, by reason of the danger of ground falling.

The WITNESS: By the way! I don't know now that the open space that I say they have mined out, would be included in the territory as described within the pencil mark.

Q. Look at it carefully, and give me your idea as to the whole or any portion of the caved territory.

A. After examining the map, I should question very much whether it does.

Q. What portion do you find?

A. Near the drift. The lines marked cross-cut.

99 Q. I call your attention to the territory between the cross-cut and the territory northwest which you included in this triangle, and ask you if there is not a cave-in on the Cleveland Iron Co.'s side and Lake Angeline side?

A. It may extend over there probably 8 or 10 feet from the section line.

Q. Just mark it out with your pencil?

A. It would be simply where I can guess.

Mr. HAYDEN: I will put the letter "C" in the center of that, to indicate the cave.

Q. Now, in case that cave, in crossing the line is approximately correct as to location, what would you say as to whether the ground caved by the complainant company, or a portion of it, lies within that triangle?

A. I should say it was not caved by the workings of the complainant company.

Q. How could you ascertain that; have you any data from which you could ascertain it, maps or otherwise?

A. I don't know how I could explain my reasons by means of a

map. I have no data in the court-room or out of it from which I could determine the question asked. I will say that I have no map from which I could show, and no data that I can offer in evidence, any more than my own statement.

Q. Will you look upon Exhibit H, which you hold in your hand, and tell me whether the mark indicated there, crossing that section line and designated as trespass strip, is correctly located?

A. I should say it is.

The map was furnished me by Mr. Jopling. I did not examine it to determine its accuracy by actual measurement. I did not compare Mr. Jopling's survey with him, from which that map was made. I did not make any examinations by measurements or by the use of instruments after receiving the map to determine
100 its accuracy; nothing more than observation while passing through the stopes and workings. I did not compare this with any other map previously made by myself for estimating trespass. I did make a map of the complainant's workings on this locality showing the trespass drift, and it is supposed to be correct.

Q. Where was the cave-in with reference to that trespass drift?

A. I should say that cave as exists there is lying to the east of the greater portion of that drift.

Q. Will you indicate on this map the portion that the cave takes in?

A. As nearly as I can determine from memory.

Q. You have marked with pencil on this Exhibit H the location of the caved ground I have been asking you about?

A. So far as I can recall it; I don't say it is correct.

Q. I will designate the territory you include within these pencil marks as caved ground, by the letters "C. G." Have I done so correctly?

A. Yes, sir.

Q. Now, will you look at this again, as marked, and tell me if so little ground in complainant's mine is caved in or filled up as would be indicated along the south line of section 10, as you have made it on Exhibit H?

A. I have simply outlined what is shown on the surface.

Q. Have you not entered the mine lately, in that portion of it as would be included in this triangle marked on Exhibit F?

A. No, sir, not lately. I cannot recall how long since I have been in there. I should say it was within one year. It is nearly a year since we finished mining there, to my best recollection. Mining operations were begun in that territory some time during the year 1892 by the complainant company. Since mining operations were commenced in 1892 they continued until the ore was mined out—that is, when the mine was working. The mine has not been
101 working continuously; I don't know when it suspended. I was trying to recall whether the mine suspended operations previous to the finishing of the mining out of that ore. They suspended operations in the fall of 1896; but I am not sure but what the ore was mined out before they stopped. I cannot tell you how many tons were mined out each year from that territory. I have no

data from which to determine. I am not sure that I can get it from the office of the company. I think I could estimate it. I could not say how nearly. I could estimate it within the limits of reason; as close probably as anybody could estimate it from information at hand.

Q. What kind of information have you?

A. Maps; they show the plan of the workings.

Q. Do they show the extent of the openings?

A. The horizontal.

Q. Any other?

A. I have no cross-sections; no, sir.

Q. Without the cross-sections you could not estimate correctly could you, only guess at it?

A. Very closely.

Q. You could make as good a guess as anybody?

A. Yes, sir; that is all I could do.

We have mined out two levels. Operations were abandoned there because we were through mining there on those two levels. There was ore beneath those levels, both sides of the line.

Q. Why did you not mine further down on the south side of the section line?

A. We were not prepared to, because the level below was not opened up satisfactorily to commence mining there.

Q. Then you have abandoned it for a year at that place?

A. So far as I know.

The largest part of the body of the ore on that territory is
102 pitching and dipping to the north side of the line. I have known that ever since we have been mining ore there, ever since 1892, and it trends, as I supposed it did in 1892. It goes over the line to the same extent as in 1892, and at the same angle as we supposed in 1892. I don't recall how soon we reached the bottom of the second level after commencing in 1892. I have information with reference to the dip of the ore body and its extent that I did not have in 1892. We have obtained more information in regard to it since then. We have opened up and discovered on the second level since that time. The actual knowledge of the situation north of the south line I obtained from visits through the Cleveland Company's mine. I obtained it by degrees since they opened up their mine. I think that has been nearly all in the years 1895 and 1896. I don't know that I discovered anything new in the last visit, which was about two or three months ago. I cannot say positively whether I went down into the defendant's mine into the territory on the north side of the line in April, 1896. I presume likely. I made various visits there, but I can't give the date. I obtained my information as to the extent of the deposit on the north side of that line from the visits to the defendant company's mine, and from the interchange of maps between myself and the other engineer. I cannot tell you whether the ore body south of the south line of section 10 is very limited. I have made no report to the complainant's officers about it. I have been asked about it. I have an opinion about the life of that deposit on the south side of the line; it is that there

is a large quantity of ore there below the second level that we have been talking about.

Q. How far from the section line is the southernmost part
103 of this deposit of ore below the second level, or at the bottom of the second level?

A. Well, that is an indefinite question. We have ore in the vein east of the shaft-house, and south of the section line; very much ore; we are mining it. I cannot recall my estimate of the quantity. I wouldn't attempt to say, because I do not know how much we have removed. The ore southeast of the shaft-house is not so good. The quality of the ore on the north side of the line where the defendant company is working its deposit is of the same good quality of ore as the complainant has close to the line. I can't say it is better as it goes over the line. It is of the same quality. From the knowledge that I have, I would not say that the largest body of this ore was on the north side of the line. I cannot say that I think there is a larger quantity on the north side than on the south side of the line. I think there is about the same on each side.

Q. That from present indications there is as much ore of this good quality south of the line as north of it; I am asking you as to the best grade of ore?

A. I can't answer that question.

Q. I am asking you in reference to what you saw while in defendant's mine; what are the indications from the openings of defendant's mine on the north side, as to where the largest body of ore is?

A. Well, so far as developed and opened up at present, it would indicate that the larger body is on the south side of the line, from any information that has come to my mind. That is my honest judgment, from any information I have. I express a limit to my information, because I cannot see what drill-holes might be opening up, etc.

Q. Do mining engineers estimate from what they cannot see; have you done so?

A. Yes, sir; my opinion is that there is about the same
104 quantity of ore on the north side as on the south side. I first knew that there was good ore on the north side of the south line of section 10 in the fall and winter of 1892 and 1893. I know of the defendant company's putting some drill-holes into this territory on the south line of section 10 under the water of the lake in the fall of 1892. I know of the drill-hole put in by the Cleveland Company from its north-side workings, through its south deposit, through the formation. As shown by its maps, I know where the drill-hole stops. I cannot tell you whether it was drilled through in 1890 or not. I have known of the drilling since it was done. After that time the Cleveland Iron Co. put some more drill-holes into that territory in from the south side of the line, between September, 1892, and the following months. They got permission from the complainant company to go on south of the line. I don't know who they obtained the permission from. I know they had the permission. I obtained my information from Captain Walters. I sup-

pose their purpose in drilling the holes from the south side of the line into the territory on the north side was to explore the territory. They found ore of good quality, I don't recollect how much. From the south side of the line, the Lake Angeline side, they drilled five holes. They started the holes in the Lake Angeline mine at the first level. I was in there every day, I don't know whether Captain Walters kept track of it or not. I don't recall of their reporting to us daily. Their object was to find ore of their own on the north side of the line. I know they found ore there. I do not recall if it was found in all the holes. Some holes were sunk in this territory just north of the line in addition to those holes run in from the Lake Angeline mine, and were sunk from the surface. I think there were five holes. Those holes were
105 sunk perpendicular to reach this same deposit that the Cleveland Co. were after, I suppose. Our company did not interfere with them in any way, in their finding ore there. I suppose Mr. Kidder knew about their drilling these holes. I know that Mr. Kidder was present at the office of the Lake Angeline Co. often. I know, as I have stated before, that what information I had was from Captain Walters, that consent had been given to the Cleveland Iron Mining Co. to drill these holes. I do not know what the Cleveland Company did after finishing these holes. I know that they commenced to run a drift across from the north side to the south side of this 640-foot diorite rock. I did not include that in my estimate of the cost of the ore take-out. Neither did I include in that estimate the cost of pumping Lake Angeline. Lake Angeline was pumped out. I am not aware that our company take any part in pumping the lake, that is, in keeping it dry. I do not know what was the date when those surface drill-holes were put down on the north side of the line, the perpendicular holes. My impression is that it was after the holes were run in from the south side in 1892. I should presume the following summer. My recollection would be the summer of 1893. The map shows five surface holes.

Q. How many of the holes sunk from the surface perpendicularly just north of the south line of section 10 by the Cleveland Company at the time you mention were put down into the lake bed, or the ground which once was under the water of Lake Angeline?

A. Four of them. One is located near the railroad track, as shown here. Another near one of the drifts leading west. Another apparently in the drift leading east; and another—the fourth—to the east of the workings, as shown on this map "Exhibit 28."
106 Three of these holes were within the territory that is indicated within those dotted lines running from the center, and called Pittsburgh & Lake Angeline Iron Company's territory, as marked by me upon the map F. These drill-holes are all marked on our map. The drill-holes running from the Lake Angeline side of the line were drilled to the northwest, and I believe one to the northeast. The point from which those drill-holes were started was under the bed of the lake on the south side of the line, and the direction they took was northwestward, across the line into the bed of the lake—all of them but one, which I think was run northeast

toward the upland. Possibly two were drilled to the north. All of the rest were run under the bed of the lake. These drill-holes pointed to, three of them at least, run northwestward within the dotted line, within the territory as shown on our map F.

Q. I show you a tracing map, marked at the head, "Pittsburgh & Lake Angeline, East End mine," etc. When was it made?

A. I believe in October, 1893.

Which map shown witness as "Exhibit 2" re-offered as "Exhibit 15."

(Here follows map marked p. 107.)

Q. I call your attention to the location of these two dotted lines running across the red section line and marked 89 feet below lake level, and ask you what that was intended to represent.

A. A trespass committed by the Lake Angeline Company upon the Cleveland Company. This trespass was westward from the shaft-house, as shown on the map, about 200 feet, and about 270 feet westward of the 16th meander post in the southeast quarter of section 10, on the south line of 10. I am not sure of the distance of the location of this trespass west of this meander post number 16.

108 Q. The 16th post between the southeast corner of section 10, and the quarter post at the south end of the north and south center line of 10, making the division line between the southeast of the southeast and the southwest, etc., the red on this map indicates the section line, does it not?

A. Yes, sir. The south section line of section 10. The purpose of making this map was to show the Cleveland Iron Mining Company where they trespassed. I was requested to make such a map and give it to our people for their disposal; and I did so. I don't know whether it was delivered to the Cleveland Iron Mining Company or not. I suppose so. I discovered this trespass by making a survey; by survey from the surface down, through the shaft and through the workings. The guiding point was the section line between sections 10 and 15. I took that section line to be the boundary line in determining the trespass. I did so because my understanding was that should be the boundary between the two properties. I had that understanding ever since I have been working there. I learned that from our people, that is, the superintendent and the agent, and maps furnished me. All the maps, etc., drawn in our office of this territory show that section line to be the boundary line between the two properties. The shaft-house shown on this map is the shaft-house of the Lake Angeline Company.

109 Q. Can you mark on this map "Exhibit F" about the place where the trespass was committed, as shown on your map of October, 1893?

A. I couldn't attempt it without the scale. This trespass as I marked it is inside of the dotted line where it crosses the section line; and a portion of it is also inside, or running through the ground, which I have marked as caved in. The ground in that

place I suppose caved in after the trespass. I do not wish that to be taken positively, because it is only from memory.

Q. There was some correspondence attached to this October, 1893, map, about which I have asked you, made by yourself. Do you know anything about the correspondence? Look at it.

A. I never have seen this.

I understood Mr. Kidder had correspondence with the Cleveland Company regarding this trespass. He got his figures and statements from me used in that correspondence.

Q. I will ask you whether this correctly states that trespass "on the first level and at a point 89 feet below the lake level and a little over 200 feet west and north of our lake shaft-house, reading from Def't C. I. M. Co. Ex. 13;" is that a correct statement of the trespass so committed?

A. I think so.

I do not recall my figures, and whether 554 tons was the amount of the trespass. No one knew of the trespass before I discovered it. This letter dated November 2, 1893, which you show me, I should say was Mr. Kidder's letter. He was the agent of the Lake Angeline Company, and performing the same duties as he has since and previously. I received instructions from the agent and the superintendent to be careful to ascertain from time to time that the work on our side of the line should not go over onto the Cleveland Company's side in this territory. I suppose I received those instructions at the time the work began. I don't recall the time. When I speak of the boundary, I speak of the south line of section 10; and I have followed those instructions. I mean when the Lake Angeline Company began work in that territory. I did not state any time. I think they began to sink the shaft in 1890 in that territory close up to the south line of sec. 10, and I think we received those instructions when we began to mine our drifts in 1892. We had our drifts all opened out before the Cleveland Company could put its diamond drilling machinery in the drift in 1892. I believe we commenced mining in the spring of 1892.

Q. I show you Exhibit G and ask you if you will tell me what part of these workings on the Lake Angeline Company's side of this line (pointing to the south line of section 10), was first worked after sinking the shaft?

A. For the purpose of mining ore?

Q. Yes, sir.

A. This side here, between the shaft and the place where the trespass was committed. That is my recollection. That is recollection, understand. This territory where we first commenced mining was in the lake bed, and running from the shaft as shown on this map northwestward towards the section line in the direction where the trespass was committed. The trespass is shown on this map, Exhibit G.

Q. I will ask you what this dotted line is at the south end of that trespass, a large dotted line covering a considerable extent of territory within this territory, which you say you mined out or began mining first?

A. The outline of our workings at that distance below the surface, 89 ft. below the surface. Outlines at that time of the trespass in 1892.

Q. What was the purpose of your obtaining this map Exhibit G from Mr. Jopling?

A. I accepted it as a gift from him. It is a common courtesy between us to exchange maps whenever it is convenient. I think that is my own dotting.

Q. Then this map, Exhibit G, is not in the same condition or state it was in when received from Mr. Jopling?

A. He evidently transferred from the map that I furnished
111 him on to one common map showing the workings of both mines, and this map was made from that; and I have no question or doubt but what it is correct as transferred.

Q. Then this map, Exhibit G, is composed from data of Mr. Jopling of the workings of Cleveland Company's mine, and data furnished by you of the workings of the Lake Angeline Company's mine?

A. Yes, sir.

Q. And it was all compiled by consent of yourself and the willingness of Mr. Jopling, for the purpose of showing to each what the other was doing?

A. Yes, sir, in December, 1895.

Q Is it not a fact that this territory, which showed your workings in 1893, is now caved in?

A. I don't know that it is. We are dumping rock in there, but I suppose it is filled. I should say we began dumping rock in there in 1893, and have done so continuously since that time; and we are doing so yet, and the operation has been practically continuous since commenced, and I believe that both levels are practically filled, and nobody could go into it.

Q. I hand you now, for the purpose of making a scale, the map of October, 1893, made by you for the Cleveland Company, to show the trespass. (Being Def. Ex. 15) Will you put your scale on that map and tell me how far east of the 16th corner post between the southeast of the southeast and the southwest of the southeast of section 10 the trespass is?

A. It did not extend east, but west. It scales 273 feet.

Q. Can you indicate it on this map, Exhibit F?

A. If I am permitted to erase all others. I wish to rub out anything, any marks that I have put on there without the scale.

Mr. HOYT: Do you mean the marks put on during the hearing?

A. The marks put on there by guess.

Mr. HAYDEN:

Q. By actual scale this trespass was where?

A. Where I have put the cave-in by guess.

113 Q. I show you a blue-print map dated January 22, 1896, scale 50 feet to one inch, and entitled "220 feet sub-level, trespass on P. & L. A. I. Co., etc." (Def. Ex. 21).

(Here follows map marked p. 112.)

and ask you if the red marks on the south side of the line there indicate some fact that you have knowledge of?

A. Yes, sir. They indicate trespass upon the Lake Angeline Company's property. I think the trespass was committed just previous to the date of that map, January 22d, 1896. Possibly in the fall or early in the winter of 1895. I believe Mr. Jopling discovered it in the fall of 1895, or the winter of 1895 and 1896, and reported it to me. I don't recall now that Mr. Jopling furnished me with a copy of this drawing. I do not remember the number of cubic feet or tons contained in this trespass. It was a trespass committed by the Cleveland Iron Company upon the Lake Angeline Company, and the trespass is where the bed of the lake is, a short distance west of the trespass committed by the Lake Angeline Company upon the Cleveland Company, south of the section line. I believe Mr. Jopling gave this map to me, and not through Mr. Walters or Mr. Kidder. I don't know whether one was sent to Mr. Kidder or Mr. Walters.

Q. I show you a tracing upon thin paper, showing some stock-piles, dry-house, and some workings on the south side of the south line of section 10, with the mark C. I. M. Co. just north of the section line, and P. & L. A. I. Co. just south of the section line, and ask you if you made the map? (Def. Ex. 29.)

A. All that in black ink I put on there, I believe. An outline of this open pit made in pencil, that I did not put on. All that is not in pencil marks I put on, to show the location of the railroad
114 track and stock-pile ground, because I was requested to do so by the superintendent. I do not know the reason. I was not told by Mr. Kidder that it was to enable him to obtain some concession from the Cleveland Company. I can't say that such a thing was ever told me.

I wrote that letter dated March 6, 1896, which you show me (Def't- Ex. 32.) I suppose it relates to this particular map. I believe it must have been at the time I delivered the map to the Cleveland Company. I don't think I made any statement to that company as to its purpose. I had been slow in furnishing this map and its formation, because I had promised Mr. Jopling previous to this that I would obtain the exact location of the track, and give him the information as soon as possible.

Q. What you were desiring to locate was the stock-pile ground, you knew for what purpose you were locating the track on this particular map, that is, it was to obtain from the Cleveland Iron Mining Company permission to build the track there, or if it had not been built, it was to obtain a lease from the Cleveland Company for a right of way for the track; that was the purpose, was it not?

A. No, I don't know that it was wholly. It might have been part of the purpose; but I am not attempting to say what their agreement was.

Q. Was not the Lake Angeline Company obtaining from the Cleveland Company at this time a lease of ground for this stock pile, to be used by the Lake Angeline Company, and did you not make the map for the purpose of showing where those stock piles were to

be located, room for which you wished a lease from the Cleveland Company?

A. I will change my statement; I don't know but that is true, that there was conversation regarding that; a talk of obtaining permission to use certain ground there.

115 The north and south line refers to the subdivision line between the quarter corner and section corner. A part of the stock-pile ground was supposed to be in the original bed of Lake Angeline. It probably extended just to the edge of the original shore of the lake.

Q. Do you know whether the stock piles from the Lake Angeline workings at this point were actually in the bed of the lake under the authority granted to the Cleveland Company at the time this map was made, or about that time?

A. I don't know anything about the authority. The very outside of the stock pile ground would touch the shore of the lake, or extend into it a way. I don't recall any form of lease that was drafted whereby the Cleveland Company was to lease to the Lake Angeline Company these stock-pile grounds. I recall only a verbal conversation as to such lease between Mr. Jopling and myself. I don't remember what it was. If there was a lease to be made, or to be given, I presume it must have been about that. I know of nothing more than talk that we be given the privilege of using certain room for stock-pile grounds, etc., in exchange for some ground that they wished to obtain for lands lying south of section 10, south of our old mine. There wasn't much of any conversation about it. I was not trying to get him to agree to anything. I had no authority to enter into any agreement. He was asking me information as to the stock-pile ground. I did not hear any conversation about the matter between Mr. Mills on one side and Mr. Kidder on the other. I don't recollect either Mr. Walters or Mr. Kidder telling me anything about such a lease of the stock-pile ground. I had a conversation with Mr. Kidder and Captain Walters with regard to it, simply as a matter of instruction from him

116 what to do. The instructions were to locate the track and stock-pile ground, to be received in exchange for our ground on other portions of the company's property.

Q. Then there was to be a written lease, or oral agreement about it. The Cleveland Company did lease to your company in that way the stock-pile ground and this right of way in consideration of the lease by the Lake Angeline Company to the Cleveland Company of some other ground by the Salisbury mine?

A. When you speak of a lease, I don't know what you mean. They had an understanding. I don't recall any written lease covering the stock pile.

Q. I show you a blue-print map with the title, "Parcel of land and right of way leased by P. & L. A. I. Co. from the C. I. M. Co., scale one inch to one hundred feet" (Defendant's Exhibit 30), and ask you if you made that blue-print map or the original from which it was made?

A. Yes, sir. I made that map for the purpose I have stated, for

stock-pile ground, and for other purposes they might see fit to use it for. It is quite possible that I would have put that title on the map without any instructions from superior officers. To some extent I am accustomed to putting marks on maps without regard to the purpose for which they are made.

Q. Don't you know as a matter of fact, that you put that title on the map for the purpose of indicating what the map was for?

A. I suppose it amounted to the same thing as a lease. I told you my understanding was an agreement. I located the railroad track shown on the map, and it was built there. I don't know anything about an agreement with regard to that track between the Cleveland Iron Company and the Lake Angeline Company.

117 I suppose they had permission to build it. I don't know if they did or not.

This map was made by me to show the Cleveland Company where it was built. It was made after the track was built. I do not know that the Lake Angeline Company asked of the Cleveland Company a written lease of the right of way where the track is shown. I wrote that letter dated July 15th, 1896, addressed by me to Mr. Jopling (Exhibit 33). My purpose in writing the letter was to get from Mr. Jopling the map I had left with him; it being the same map that I have just shown you, with the title in red on the map of which this is a copy. I desired to get it back that I might add to it as I have described in the letter. I remember going down into the mine of the Cleveland Company in the territory just north of the south line of section 10, and on the section line between the workings of the Cleveland Company and the workings of the Lake Angeline Company, in company with Mr. Jopling, the engineer of the Cleveland Company; Mr. Parnell, Mr. Walters, and Mr. Mills. I cannot remember the date. I don't recall the purpose of going to the mine in question with these gentlemen on the *the* occasion in question; but it seems to me it was in regard to the work adjoining the line, that is along the line. Probably it was with regard to making the boundary line. It is impossible to state what I did on that occasion. There must have been timber sets in mine at that place. Mr. Jopling and myself had our instruments with us. I don't recall driving nails upon the section line in the timbers at that time. I did so at another time. I don't remember whether it was just before or after that visit. I am trying to recall the purpose of that visit. We went down there to fix the boundary at that point.

118 Witness examining Exhibit G, pointed out the place on the map where the boundary was fixed, and where nails were driven to mark the boundary, and states that it was on the south line of section 10 under the lake bed, at a point 226 feet below the surface.

Witness continued: It was where our second level joined the second level on the Cleveland Company's side of the line. The purpose of going there was to mark the boundary line. I cannot remember who was helping me in the work. I don't think there was anybody in connection with the Cleveland Company with me at the

time I put the nails in, nor at the time I ascertained the place where to put the nails; not until after the work had been done. The other parties made an independent survey. My survey was independent also; and when we agreed, Mr. Jopling was there; and I am not sure whether Mr. Parnell was present or not. I don't recall whether Captain Walters was there. We made two or three visits there. I do not recall going down with Mr. Kidder, Mr. Walters and Mr. Mills for that purpose. I will not say that no such visit took place. I simply say I can't remember. I went down there under instructions from our company, from the officers having charge of such matters for that purpose. I did not tell Mr. Clark about it, and I can't just at present recall the year; I think it was the summer of 1895. Mr. Jopling went with me when we went there to ascertain the boundary line, at least on one occasion, that we might meet together on the matter, as the respective engineers of the companies, and we did agree as to the boundary line, and we fixed nails at the point agreed upon, and that boundary was the section line. It was 368 feet from the 16th post westerly.

119 There was a trespass at that point. That is why we wanted to fix a boundary in that particular spot. It was the point where one of the trespasses of the Cleveland Company on the territory of the Lake Angeline Company was made. It was fixed that we might know where to work with reference to the section line. I don't know that Mr. Kidder told me to do it; I think it was Captain Walters directed me there. I don't know that Mr. Kidder asked me about the boundary. Mr. Kidder complained that Captain Buzzo, of the Cleveland Company, was lawless in the way he went over the line there, and that Mr. Kidder wanted the line fixed. He talked with me on that subject. I took the length of the drift on the Cleveland side, through the diorite, from scaling it on the map. This I did within the last week or so, not from actual measurements made by me in the mine. I estimated the quantity of ore in the mine from the maps and general observation, passing through the stopes and rooms, and glancing about with my eye. I had no instruments with me. I determined the quality of the ore by examining it with the eyes. I think I can judge accurately as regards to the percentage of iron ore by looking at it. I have had experience in such matters. I looked at the ore in the workings in the stopes where they were mining it. Sometimes the ore changes within the distance of a foot or two, so that one side of a line may be good ore, and the other side poor. The ore in a body is not always of the same quality. I do not know whether this is true of the deposit on that side. I did not examine enough to determine. My estimate of the ore over there is not based on the idea that everything was good, and that there were no grades. I estimated it for one grade only.

Q. I want to ask you, Mr. Bradt, if it is not true that you
120 guess not only at the quantity, but that you guess at the several grades and the quantities in each grade, in the same general way?

A. No, sir, I do not guess. I have described it to you by the use

of maps and observation. I could estimate the quantity taken within the triangle, when I know its limits. I could make an estimate from my knowledge of the workings and information I have from the maps. I don't call it a guess. A guess hasn't any information whatever to base upon.

Redirect examination by Mr. CLARK:

The Pittsburgh and Lake Angeline Company began mining on this south vein south of the south line of 10 in 1892, in the spring. My recollection is, that the Cleveland Iron Mining Company drifted through this diorite into the formation north of the section line so as to begin mining iron ore in the fall of 1894. They had not then mined any ore north of the south line of section 10 and south of this diorite division line, that is, before the year 1894 or 1895. The workings of the Pittsburgh & Lake Angeline south of the south line of 10 showed very plainly from the dipping of its formation that the same body of ore was going north of the south line of 10 in the workings.

Q. Do you know whether any information was derived by the Cleveland Company from Captain Walters or Mr. Kidder, or from yourself, as to the fact that ore was dipping north of that section line?

A. I know it had been discussed with Captains Mills. He was agent of the mine at that time.

Q. Now was that the way they learned there was this valuable deposit of ore there, from information received from the Pittsburgh & Lake Angeline Company?

A. No doubt it was one of the reasons.

121 I do not recall how early conversations were had with the Cleveland Company or Mr. Mills as to the dipping of the ore to the north under the lake. There were conversations with Captain Mills by persons working for the Pittsburgh & Lake Angeline Company with regard to the formation, and the probability of its dipping to the west sufficiently far to go over the line. A man skilled in mining can tell what course the ore is taking. I could discover from the pitch of the formation whether it is pitching to the north side of the line. I know this matter was talked over in the presence of Captain Mills. It was before he put drill-holes across from the Pittsburgh & Lake Angeline mine that I have mentioned. I cannot recollect how long before. It was after we had begun to open up that mine. I suppose that the information he got from Captain Walters and other employees of the Lake Angeline was what caused him to go in there and drill, for the reason that he did it after such conversation.

The character of the ore north of the line was just the same as south of the line. Generally in a definite fixed ore body between foot and hanging walls, there is a general similarity as to the quality of the ore. There may be different qualities, but that is the general rule, within a reasonable limit of distance. I saw the

stock piles of ore that was brought out of the workings by the Cleveland Company south of the dotted line from a distance.

Q. Now take these drill-holes you speak of, five down in the mine there, and five others from the surface, as drilled by the Cleveland Company; can you form an estimate of the cost of those drill-holes from the experience you have had in drilling such kind of drill-holes, in such places, that is, the outside cost of such drill-

122 holes?

A. I presume I could form an opinion. I am hardly prepared to do so without thinking it over. I will think it over and give you an estimate.

Q. Now you say that the Pittsburgh & Lake Angeline Company did no part of the pumping of this lake; you don't mean to say that they did not help pump out the lake?

A. No, sir.

Q. Does the Pittsburgh & Lake Angeline Company do anything toward the draining of any portion of that territory surrounded by those meander lines?

A. Yes, sir; taking care of all the water from the south side of the lake, south of the diorite division that has been mentioned, and that flows in from the south slope of the entire lake. It takes care of that water by means of a flume, as shown here upon "Exhibit F," by the line which is marked "surface drainage flume," which I think is located directly across the south portion of that lake, the south arm of the lake. The flume was constructed by the Pittsburgh & Lake Angeline Company entirely, and is maintained in good condition by the Lake Angeline Company, and the Cleveland Company and Lake Superior Company pump the water which they pump in taking care of the water north of the diorite division by pumping the same into this flume. The point on the map marked "Exhibit F," marked "scow," just north of the dotted line and just north of lot 4, sec. 15, marks the point from which they pump and by which it is carried by a branch flume over into the main flume I have mentioned, and which appears here on this map. A branch flume extends from the point marked "scow" over to the flume as marked on this map. That pumping takes up the water to the east, and from territory of the Cleveland Iron Company and it is car-

123 ried into this same flume by means of a pipe line, extending from the eastern end of the lake to the flume at the point marked entrance of pipe line, which is near meander corner number 15. Those two means of taking up the surface water on the territory of the Cleveland Company and the Lake Superior Company carry off all of the water that would flow into this basin called Lake Angeline, so far as I know, and the Pittsburgh & Lake Angeline Company takes care of the entire flume for the entire territory at its own expense. There is no other mode provided by the Cleveland Company or Lake Superior Company for carrying off the water, except this flume. I have reference to the repairing of the flume and keeping it in proper condition.

Q. Do you know whether there was any contract made between the Cleveland Company and the Lake Angeline Company and

the Lake Superior Iron Company as to pumping of this lake, and the putting in of this flume, and paying their relative share?

A. I knew of such a conversation. I have never seen the contract.

So far as I am able to plat it from the maps of the Cleveland Iron Mining Company, this map Exhibit F marks down correctly the length and location of the drill-hole through the quartzite belt in the south half of section 10, and is a line marked on their map "Drill-hole 980 feet long." That is the length of the hole to the best of my knowledge. I have had experience and knowledge of the expense of such drilling through quartzite and through ore, such as has been described in the location where this hole was drilled.

Q. What do you say was the cost at the time that was put in, per foot, drilled through the quartzite?

Mr. HOYT: We object to that question as incompetent and immaterial.

124 A. I estimated that covering all expense, an outside figure would be $2,910, to drill the entire hole through the diorite. It is not quartzite. That would be drilling from their north deposit of ore through to the south line of section 10, and would be on the course we have marked it on this map, and 150 feet below the surface. This drill-hole was from the workings on the north side of the diorite, not from the bottom of their shaft of their workings; I don't know but their shaft may have been below that. It was from the ore body as it came up to the diorite rock, through to the section line, as shown on their maps, from the maps furnished by Mr. Jopling that I have referred to. I estimated the cost to be about the same as drilling through jasper. In drilling this drill-hole I don't think they passed through soft ore any more than mixed ore; nothing of value that I know of. Owing to the distance this soft material is from the beginning of the hole, I estimated it about the same per foot right straight through.

Q. You speak of five holes from the surface as drilled; can you give us—that is on the Cleveland Iron Mining Company?

A. Five within that dotted line.

Q. Within the jasper territory?

A. Within the jasper territory.

Q. South of the line marked 51 degrees north 49 minutes west?

Mr. HOYT: I assume, without my repeating, that it is understood that our objection still continues to these questions.

COURT: O, yes, unless there is some further ground of objection; it is just as well to make one objection on this subject.

Q. There were three holes south of that dotted line?

A. Yes, sir.

125 Q. What do you figure the expense of putting those holes down to be?

A. About $2,112.

Q. What do you mean by about—the outside?

A. The outside.

I know the depth they have given. I have taken it from their map, the depth given upon the maps of the Cleveland Iron Company.

Q. Were those the only three inside of this disputed territory drilled from the surface by the Cleveland Iron Mining Company?

A. So far as I know.

Q. You speak of five drill-holes from the workings of the Pittsburgh and Lake Angeline, south of the south line of section 10 through to the north across this disputed territory and over into the territory of the Cleveland Iron Mining Company beyond the dotted line. Will you state what would be the outside cost of those drill-holes?

A. $3,438.

Q. As I recollect, you stated they were from the bottom of the workings of the Lake Angeline?

A. Not from the bottom of the workings; from the first level. That would be 134 feet below the surface. Two of these drill-holes were on an angle down, and the other three were horizontal, if I recollect right. These drill-holes we have referred to comprise all exploratory work done by the Cleveland Iron Mining Company by the diamond drills on that property, from this place, before it began taking out this ore and during the time it has been taking out this ore. I have examined into the depth and expense of drilling of this disputed territory between the Lake Superior Iron Company and the Pittsburgh & Lake Angeline Iron Company that I have referred to. There were six holes in all; and the outside expense of drilling those holes would be $5,485.00. That would include the
126 sinking of stand pipes. In the Cleveland Iron Mining Company's drilling I have mentioned, I also included stand pipes, and all their work connected with putting those holes down.

Q. Have you got a copy here of the workings of the Lake Superior Iron Company showing these drill-holes, or are they marked on this map Exhibit F (Complainant's Exhibit F)?

A. They are marked on that map. I would state that these six holes includes one just over the dotted line outside of the disputed territory; it is so close upon the line that I included it. That is the one located near the office. That would be just north of lot 5, section 15.

Q. You say that Captain Walters gave permission to the Cleveland Iron Mining Company, or Captain Mills, to go down into the Pittsburgh and Lake Angeline workings to put these drill-holes across; do you know whether Captain Walters gave information to Mr. Mills as to the fact that the ore was sloping from the Pittsburgh & Lake Angeline workings over into this territory north, north of the south line of section 10?

Mr. HOYT: I object to that—the same objection.

A. I heard such conversation between them, in my presence.

Q. What did you hear Captain Walters say to Captain Mills about the matter?

A. Well, I visited, in company with Captain Walters and Mr. Mills, and I think Captains Read and Tregambo and myself, were discussing——

Q. Who was Captain Read working for?

A. The Cleveland Iron Mining Company. At the time we were discussing the formation, pitch and trend, and as to the probabilities of where it would extend.

Q. What did Captain Walters say to Mr. Mills about it?

127 A. To the best of my recollection the sum and substance of it was, it extended over across the section line.

Q. North of lot 3, section 15?

A. I think it is 3; I am not sure about it.

It would be north of the south line of 10. That was before they put in the lateral drill-holes from the bottom of the Lake Angeline mine to the north.

Q. Do you know whether that was the inducement, or what caused them to put those holes in, that statement or information by Captain Walters?

A. I presumed that; I don't know. From the facts stated I would presume that to be so.

Q. Now I call your attention to this map dated January 22d, 1896, which has been offered as our Exhibit H, and call your attention to the circular line lying just a little west of the line known as you have stated here the 16th line, north of the south line of 10, right alongside the circular line marked P. & L. A. I. Co. stock pile, and ask you if that refers to the north stock pile that has been testified to as located over the south line of 10 by the Lake Angeline Company?

A. The one that I have understood to be the one.

Q. And that was the map, as located by Mr. Jopling, the engineer of the Cleveland Iron Mining Company, of the stock pile?

Mr. HAYDEN: That is very leading.

A. No; he has transferred it onto this map. He has this on the map as the location of the stock pile. I received this map from him.

Q. Now I show you another circular surrounding, marked in the same way, "Pittsburgh & Lake Angeline Iron Co. stock pile" lying further to the east, and just north of the south line of 10, and just a little above and a little east of the structure marked

128 "pocket," and ask you if that marking is the indication of stock pile that has been referred to?

A. Yes, sir.

Q. As put there by Mr. Jopling?

A. Yes, sir.

Q. Now this long parallelogram, marked pocket on this map, near the south line of 10, does that refer to the same form of a structure on Exhibit F, near the line marked by you "pocket"?

A. Yes, sir.

The scale of our Exhibit F is 264 feet to the inch.

Q. Now looking at the structure marked "pocket" on this Ex-

hibit F, and comparing it with the one put on by Mr. Jopling on this blue print, and considering the fact that he has the scale of the blue print fifty feet to an inch, I ask you to say, looking at the pocket, would this north stock pile as applied by Mr. Jopling be outside of the dotted line north, 51 degrees, 49 minutes west?

Mr. HOYT: Wait a minute. I object to that as leading.

Mr. CLARK: State whether or not.

Mr. HOYT: Same objection continued.

A. It would be.

Q. I further ask you, looking at the same platting there on the two maps, state where it would be located as to the meander line that extends into the territory just north of lot 3 of section 15, 47, 27; whether inside or outside of the meander lines of the lake?

A. It would be outside.

Q. On which side of the 16th line which you have previously spoken of, east of the quarter post on the south line of 10?

A. As shown on the map it would be the west side, between the 16th post and the meander line of the lake.

Q. Now this place that Mr. Jopling has got marked engine-
129 house on this blue print, which I have just referred to, Exhibit H, state whether that is the same engine-house which you have marked on Exhibit F, just south of the south line of 10, on lot 2, near the section line.

A. It is.

Mr. HOYT: That question is objected to as leading.

Q. You were asked questions with regard to leases drafted and submitted to Mr. Kidder or Captain Walters with regard to the line of railroad platted here on Exhibit F. Do you know anything about such leases; have you any personal knowledge in any way, whether any such leases were executed, or what was done with them?

A. No such thing was ever executed to my knowledge.

Mr. HOYT: I object to that answer as not responsive, and as incompetent.

Q. Have you anything to do with, or control of the matter of leases, anything of that kind, or sale or disposing of any property in any form in connection with that mine?

A. No, sir.

Mr. HOYT: That question is objected to as leading, as immaterial and incompetent.

A. You say in any form; do you include in that, that I am never called upon to give my description, or anything of that kind?

Q. No, I mean to sell or dispose of?

A. No, sir.

Q. It is your business to make surveys and descriptions when asked to do so?

A. Yes, sir.

Q. Now in speaking of these matters, in answer to my brother Hayden's inquiry yesterday, you spoke of your superior officers in connection with what you did. I ask you how you refer to your superior officers; who directed your operations in what you did?

A. Captain Walters and Mr. Kidder, the agent.

Q. You speak of putting in some pieces of timber to drive
130 nails or spikes down in the openings of the Cleveland Iron Mining Co. and Pittsburgh & Lake Angeline Iron Co., for the purpose of locating the south line of section 10. By whose direction did you drive those nails there, to run that line and put them in?

A. I am not sure whether my instructions came directly from Captain Walters or Mr. Kidder; one of the two, or both of them. Understand, I didn't put in timbers; the timbers were there; simply placed nails. The timbers were used in the holding up of the mine and the mining work, the workings of the Pittsburgh & Lake Angeline Company and the Cleveland Iron Mining Co. there at that point, simply workings that came together, in one deposit; the line between them being an imaginary one. That line I sought to locate by nails. The ore was of the same quality in the two deposits.

Q. You were asked whether the water, as it originally was in the lake, came right up to the meander line of the portion you did run. I now ask you whether you know what was the location of that water when the original meander lines were run?

A. I do not know.

Q. Do you know anything about whether the lake had been lowered before it was pumped out while you were there?

A. Yes, sir. It was lowered by cutting a ditch and lowering the outlet of the lake.

Q. How many feet was that lake lowered before it was pumped?

Mr. HOYT: I object to that as incompetent.

A. My recollection is, it was between two and three feet.

Q. On this territory that you say you did run, just for the purpose of seeing how the meander lines as platted correspond with the lake in sections 10 and 11, I ask you what is the nature
131 of the bank, whether low or flat, or whether it is high right from the water?

A. It is very flat.

Q. If it was very low, if the lake had been lowered two or three feet, would the lake water have flowed further back on this low land if it had not been lowered?

A. If it had not been lowered, yes, sir.

I have no knowledge of how many times that lake was lowered before it was pumped out by digging out the outlet, that is, no direct knowledge, no personal observation.

Recross-examination by Mr. HAYDEN:

It was in 1889 when I first went to the Lake Angeline Co. as an employee. I do not know what the conditions were prior to that

time. Mr. Clark has asked me the location of these stock piles which Mr. Jopling has marked on this map Complainant's Exhibit H from data furnished by me, as I understand it. I suppose he put that on there from that. I know the location of the trespass drift for the trespass committed in 1893 by the Lake Angeline Co. upon the Cleveland Co. I have that in mind.

Q. Now, in 1894 was there not a stock pile put upon that identical ground, right over that trespass drift?

A. I think it extended over there; I am not sure.

Q. Now, it was to cover in particular that very stock pile that your people obtained permission from the Cleveland Iron Mining Co. in 1894 to maintain or to put further stock piles there?

A. I don't know anything about the understanding or agreement between them, only from actual occupation.

Q. Up to what time did that stock pile, that extended over that trespass drift, occupy that terrritory?

132 A. I believe it was up to the spring of 1895.

Q. I don't need to call your attention to the fact that the stock pile that covered the trespass drift would be within the lines shown on your Exhibit F?

Mr. CLARK: I object to that assumption as a statement of what is not true in the map furnished.

Mr. HAYDEN: You made the map of the dotted line, coming to that point near the stock pile; you also made a map——

A. Which one?

Q. This trespass drift; you made them both?

A. Yes.

Q. You drew that dotted line from this meander corner 16?

A. Yes, sir.

Q. So that the trespass drift was within the dotted lines?

A. Yes, sir.

Q. And the stock pile which covered the trespass drift was also within the dotted lines?

A. The one you refer to; yes, sir.

Q. And on the north side of that south line of section 10?

A. Yes, sir; I will say, after looking at this map, I will change that; the stock pile. I don't now believe that the stock pile extended over the drift, as a railroad track was at that point, the stock pile being just north of the track.

Q. How far did the stock-pile ground extend; put a point on this (indicating place on the map)?

A. Putting points are very indefinite; the track came over here some place (indicating).

Q. Won't you mark it with a pencil there?

A. (Place marked.)

Q. Now I will indicate this territory by the letters S. P.; the mark you have made indicates where, in your best judgment, that stock pile which you first said covered the drift actually extended?

A. As I think of it now: yes.

Q. As you mark this stock-pile ground, extending towards
133 the trespass drift, that is within the dotted lines?

A. Yes, sir.

Q. What is the purpose of diamond-drill borings; it is to discover the existence of ore, is it not?

A. Yes, sir.

Q. When conducted in an iron-ore territory?

A. Yes, sir.

Q. Now the actual discovery of iron ore by diamond-drill borings does not necessarily show any value in the ore discovered in the drill-holes, does it?

A. It does not always.

Q There is no certainty attending it, is there, because of the fact that the drill may discover the presence of ore in such narrow fissures or such very small deposits, or the ore may be of such mixed character, mixed with rock, that on being developed or shown up it would be practically valueless for working?

A. It might be. That is one of the hazards of discovering the existence of iron ore that way. In many cases, for the purpose of seeing whether it is of any value, it is necessary afterwards to sink shafts and run levels or drifs, to discover whether there is any quantity sufficient to pay.

Q. In that place on the north side of this south line of section 10, reached by the diamond-drill work, no one could tell, with the diamond drilling that was done there, whether there was any extent to the deposit on the north side of the south line of 10 or not, without subsequent opening up of the ground beneath by drifts and levels; isn't that true?

A. Well, if you refer to the five drill-holes drilled from the underground workings of the Lake Angeline, I should say it would not be necessary to drive the drifts, on account of the pure quality of the ore that they obtained from it.

134 Q. But pure quality of ore is limited in its extent, isn't it; the deposits are not necessarily world-wide, world-extensive? you guess there was ore there?

A. No, I wouldn't.

Q. You couldn't positively know, could you?

A. Just as certain as knowing anything.

Q. But you didn't know, did you?

A. I wasn't in the ground.

Q. You couldn't know; you couldn't as a matter of fact, as an engineer of experience, the fact that diamond drills do not always show large deposits—isn't it a fact that though those holes discover ore there, you couldn't tell whether just beyond or just beneath rock might not cut the deposit off, and limit it?

A. O, that is true, yes, sir.

Q. Now it is a fact that several of the holes run by the Cleveland Iron Mining Company, both from that side of the line and the holes on the north side of the line to discover this south deposit, found nothing; they were run wholly in rock; nothing was found at all; isn't that true?

A. Partially in rock.

Q. Isn't it true that some of the holes were wholly in rock, discovered no ore on the north side of the line, drilled from the Lake Angeline?

A. No, sir.

Q. Those holes drilled northeast?

A. Not so shown by the record.

Q. Did all of them show ore?

A. Yes, sir; north of the line, as recorded on the map.

Q. Good ore, merchantable ore—what record are you looking at, record of what holes?

A. Of these holes.

Q. Is this the record of the five drill-holes?

A. Yes, sir; it shows remarkably good ore to the north, drilled northeast; drilled from the south side of the line to the north and northwest, and these records show the ore on the north side
135 of the line. The dividing line between the north side and the south side is at the point marked with a star here. The star intended to indicate the section line. I suppose the engineer put the star there; I am not sure. It came from the Cleveland office. I mean the office of the Cleveland Iron Mining Company.

Q. Will you call my attention to those two other holes run northeast from your first level?

A. Yes, sir. They were both in ore from there north of the section line. The hole was 427 feet, a trifle more that half ore that the drill passed through was in ore on the north side of the south line of 10, on the north side of the section line, as shown on this map. It run out of the ore into the rock. I should judge, without scaling it, that it run through about 16 feet of ore before running into rock. It was not of itself a large deposit of ore

Q. If it had been all there was, it would not have been of much value?

A. Well, not taking into consideration the possible length, or anything.

Q. Can you tell anything about the length of a vein of ore bored by a diamond drill, without developing it?

A. Not without several holes; not from this one hole; of course we don't know the length or height of it.

Q. Can you tell the width of it in every place, and its length by several drill-holes?

A. You often can.

Q. Have you, during any of your business in the locating of drill-holes?

A. Yes, sir; quite a number of times.

Q. Have you ever met with failure in discovering anything of value?

A. Yes, sir.

Q. Do you not know from experience and observation, both by your own practice and that of others with which you are familiar,

that with many drill-holes we find ore in a likely place, re-
136 sulting finally, after development, in no body of ore of any particular value?

A. I don't recall directing any holes.

Q. Does any good mining man rest upon the drill-holes showing a large quantity of ore so that he can bank on it and proceed to a large development accordingly?

A. Well, not always.

Q. Were you called in to decide whether the diamond-drill holes from the Lake Angeline Company's side of the section line to the north, by the Cleveland Iron Mining Company, exhibited a certain quantity of ore?

A. No, sir.

Q. It was after these drill-holes were sunk that the drifts were run and levels made to show up what ore there was, by the Cleveland Iron Mining Company?

A. Yes, sir.

Q. Those drifts and levels were made to show whether there was a large quantity of ore, were they not?

A. I don't know what their intention was.

Q. That would be ordinarily the case, wouldn't it?

A. Well, it might and might not; I don't know that it is ordinarily the case.

Q. There is always a hazard attending the effort to find ore and development, isn't there; there are many contingencies which may cut off the best prospects and show finally that they are of little value?

A. There are some; I wouldn't say a great many.

Q. Isn't it well known in explorations for iron ore in any territory, no matter how likely, that rock may cut off good ore, or that a poor or mixed quality may come in and shut off what seems a first-class ore deposit?

A. True, it is possible.

Q. And makes the value more or less undesirable?

A. It is possible.

Q. It is all speculative; it is a speculation, isn't it?

A. To a certain extent.

137 Q. When Mr. Walters advised Mr. Mills that there was ore, he thought, on the other side, did Captain Walters know it?

A. No, sir.

Q. He guessed at it, didn't he?

A. No, sir.

Q. Then he guessed at it?

A. No, he didn't; there is a difference between guessing and thinking or imagining; guessing is without any foundation whatever.

Q. He speculated that there was ore there; how do you like that word?

A. That is better than guessing.

Q. Do you know now where the limit of the deposit is?

A. No, sir.

Q. The extent of the deposit has been shown by the driving of stopes in it, which was not shown by the drill-holes; is not that true?

A. Yes.

Q. It was after Captain Walters told Mr. Mills that he speculated that there was ore on the north side of the line that the diamond-drill holes were run, wasn't it?

A. I don't know whether he told him he speculated on it or not.

Q. I am using the word that seems to suit you in this case.

A. I don't know as that exactly suits me.

Q. What does suit you?

A. After he expressed an opinion.

Q. An opinion to what effect?

A. That he believed there was ore there.

Q. Then the diamond-drill holes were run?

A. Yes, sir.

Q. And the holes were run to discover whether the ore was there or not, weren't they?

A. Yes, sir, that was the purpose.

Q. I want to ask you if you brought those maps which I asked you for, showing your workings on the south side of the line under the bed of the lake?

A. Yes, sir.

138 Q. Will you produce them or one of them?

A. Yes, sir. (Maps produced.) This is the older of the maps.

Q. What is the date of the map you now show me?

A. The last work done on that was in the winter of 1895. This irregular blue line on the map is the outline of the map.

Q. The outline of the lake bed, as it existed at the time of making, at the time the map was started, or completed?

A. No, sir; before that. It was taken from another map, I believe was started in 1892, and *and* shows the outline of the lake as it was previous to that time, after the lake was dammed up.

Q. You mean the water line when you say the lake?

A. The shore line at the time the map was made from which this was taken.

Q. The line shows 10 and 15; is this it?

A. No, sir—the red line.

Q. This shaft-house shown is the same shaft-house shown on your maps Exhibits F and H?

A. Yes.

Q. Are these marks I call your attention to, long marks made toward the section line, drill-holes drilled by the Cleveland Iron Mining Company?

A. Yes, sir.

Q. What are these red contour lines?

A. They are lines of the surface; they are intended as the line representing the elevation of five feet above the lake or water, or lake level at the time of making that.

Q. Is this point I call your attention to on this map you show me—this is marked "East end"?

A. Yes, sir.

Q. Beginning on the south side of the line of that trespass drift of 1893?

A. Yes, sir; in the north end, north part of our workings, pointing towards the section line and the commencement of the drift, the drift that became the trespass drift of 1893.

Q. Within the dotted lines below that shown where the ore has been taken out, been worked out.

A. Yes, sir.

139 Q. This ground here with the ore worked out here is the ground you have been filling for some years?

A. Yes, sir.

Q. Is that trespass drift up as far as the line also filled by this rock filling, as far as the section line?

A. No, sir; a part of it, however, is caved, it must be by this time.

Q. Does the rock filling extend to the cave on the south side of the line in your part of the workings?

A. I am not sure whether it does or not; you refer to the cave on the surface at the Cleveland Company—I am not sure whether this fill enters that or not.

Q. Is it likely to have done so?

A. You mean is it possible to enter that as a result of mining?

Q. As a result of filling that you have done through your shaft or as a result of caving, or both causes? What I want to know is, whether the drift is filled up either by caving ground or by rock you have dumped into that raise you speak of for the purpose of filling those open workings just below the trespass drift?

A. The trespass drift has not been filled by any rock fill. The caving was done by the Cleveland Iron Mining Company by reason of work on the north side of the line. The fact that it was mined out on the south side would be no evidence. There is no trespass drift until it gets over the line. If the ore had not been taken out south of the line in that drift, it couldn't cave in, of course; that goes without saying.

Q. Now, has any mining work been done to the west of that drift south of the line, than shown in these dotted lines on this map?

A. Not on a level corresponding with that.

Q. Had it been done on the level below that?

A. Yes, sir: the level has been caved and filled; the work-

140 ings on the level below or west of the drift are liable to have been filled up close to the line. That being so, no one could go in there now to measure the territory mined out.

(Map referred to marked for identification.)

Q. This map which I show you, entitled "E-shaft workings, second level," is intended to represent the east end?

—. The shaft-house marked on this map is the same shaft as shown on our maps, Exhibits F and H; and this shaft running to

the southwest is the same shaft as shown on our maps, the maps to which my attention has been called. This red line is the south line of section 10.

Q. I ask you if the trespass drift, run across into the Cleveland ore in 1893, was not located at the upper end of this space inclosed in dotted lines, and entitled "Outline of ore body, 120 feet above second level," did not extend from the upper part of that outline as indicated by my pencil?

A. Yes, sir.

Q. Here is the quarter post, and out here somewhere is the meander corner 16; what is this mark?

A. The outline of the shore line.

Q. This irregular blue line is the outline of the shore line. Can you rub out the pencil mark when it becomes necessary, after this suit?

A. I will try it. You may put a pencil mark to indicate where the trespass drift would run. It was from the first level. It is right at this point here marked on the map where the dotted lines are.

Q. I will indicate this on the workings of the Lake Angeline Company, on the south side of the section line, at the point where this extends over across the line, becoming the trespass drift of 1893, by the pencil letters T. D., as the same as marked by the witness. That is correct, is it?

A. Yes, sir; I think so.

141 Q. Now, will you tell me whether this ground marked on your map just to the west of the trespass-drift workings and marked ore mined out down to this level, is the second level you speak of as having been filled after being worked out?

A. Yes, sir. That is the second level, and it has been filled. Between the first and second level under the trespass drift down to the second level it is ore.

The ground mined out and filled, referred to by the witness, is shown by red lines and dots on Complainant's "Exhibit G."

This second level shown is supposed to be under this first level at an angle, so that you could get down from the first level to this ore without going through any intermediate rock; and the lower level as shown by the words "rock" on one line and "jasper" on the other, is narrower than the upper level; the ore body is narrower on the second level than on the first level; it is the same ore.

Q. The same ore body; I don't know whether it is or not; I ask you?

A. I should say not; now understand me; the same ore or the same trend or pitch that would be continued from this body down to the second level is really no smaller; if anything a little larger, wider, between foot and hanging.

Q. This portion of D-shaft working on the second level shows the ore body on the north side of this arm of the lake as all pitching over across the section line upon the north side of it?

A. Yes, sir.

Q. You said the ore body on the north side of the section line was no greater, and about the same extent perhaps as that on the south side; what portion of the south-side ore body did you refer to?

A. I mean the formation of the ore body in general. We have mined down to these dotted lines, and the dotted lines on our
142 map show ore mined out. Those dotted lines indicate the outline of the workings. We are not mining in this place now. We are filling rock in there, rock taken from other parts of our workings. That ground is filled continuously from workings off to the southeast.

(Map marked for identification.)

We constructed a flume a number of feet east of this southeast arm of the lake. We constructed a dam from which to run the flume at the end of the basin, east of this arm of the lake, as shown on the map just at the point as shown; it is still further east. It was done to stop the flow of water from further up the hills coming down, as it would otherwise come into this arm of the lake. From that dam we have constructed a launder running west to carry it from this, so it will not come into the Lake Angeline mine. This dam and launder takes care of the water that naturally comes in, or would otherwise come in from the south arm of the lake south of the section line. At this point it does not take care of any water that might come into this eastern arm of the lake on the other side of this section line. We have taken no work that would prevent the water going into the lake at this eastern arm north of the section line, not to my knowledge. So that the dam and launder of the Lake Angeline Co. to prevent water coming in here, takes care of water coming only from the south side of the section line. Mr. Kidder never consulted me with reference to putting a dam on the section line across this arm of the lake to prevent—a cofferdam, so that the Lake Angeline Co., by keeping the water out of it, could go on and mine without reference to water in other parts of the lake; never consulted me as to that. I heard Mr. Kidder allude to it in a conversation and mention it. I don't recall the conversa-
143 tion. I can't say how long ago Mr. Kidder mentioned it to me. I cannot say whether it was a good many years ago, and previous to the pumping contract with Howell. It is my impression that I heard the conversation with regard to it about that time. I don't know what it grew out of. I do not know whether it grew out of any reluctance of the Lake Superior Iron Co. to enter into any agreement to pump the lake. I do not know anything about the price of ore in 1892, 1893 and 1894. I do not recall it. I do not know that the prices of ore were higher then than now.

Cross-examination by Mr. HANCHETT:

Q. Mr. Bradt, you have spoken of the lowering of the lake before the pumping arrangement was made. Was not that also done in order to diminish the quantity of water that would be necessary to be pumped if it was not done?

A. Not the lowering of the lake that I refer to.

Q. When did that occur?

A. I believe in 1889.

Q. Has the outlet been lowered more than once within your knowledge?

A. Not unless you consider the lowering of the lake at the time the gentlemen took the contract for emptying the lake. No, not by lowering the lake at the outlet. I think that was in 1889. My recollection is that it was lowered then between two and three feet, and that would lower the lake to about the same extent. I do not know what the depth of the water was in this southeast arm of the lake prior to its being lowered from the outlet. I couldn't make an estimate within probably five or ten feet. It might have been anywhere from twelve to fifteen feet, on account of the depth of the lake south of the south line of the section, on lots 4 and 5. I

144 wouldn't want to state, because it would be so indefinite. A map was given me by the *the* engineer of the Lake Superior Iron Co. showing the holes drilled by that company, and I have located the holes drilled on our Exhibit F from that map. They exhibited the map to me; I have not the original; I have a rough sketch of it. It is here with me. It was furnished to me some time during last summer. This is the map. (Map shown counsel.) It was furnished by their engineer. It was furnished possibly in June, 1896. That might be two or three months out of the way. These drill-holes and the pencilings on the map "Exhibit F" are supposed to be the same as on the map furnished to me. I put them on myself. I made a copy from their map; made a tracing, and in those respects, so far as I could make it, it is a correct copy of the map furnished. The map was furnished to me by C. E. Hendrick. This map shows the location of three of the holes that have been spoken of as within the dotted lines; they are numbers 1, 2 and 3; but does not show the location of the holes that were in the neighborhood of our office.

Q. Now, with reference to the map F which you made, I ask you whether in making the apportionment which you have testified to, which you did make, exhibiting the territory that would be a frontage belonging to the Lake Angeline Iron Company, if you paid any attention whatever to the result as to the frontage which would belong to other parts of the shore?

A. I don't think I understand you.

Q. In the map F you have drawn lines, for instance, from meander corner 13 to meander corner 14, to what you call the equitable center, showing the territory of acreage which you gave?

A. Yes, sir.

145 Q. Then from corner 15 to meander corner 16 you have drawn lines also to this equitable center showing the territory, of which you have given the acreage, as belonging to this frontage between those points?

A. Yes, sir.

Q. Now you have paid no attention to what the frontage would be pertaining to other portions of the shore, have you?

Mr. CLARK: I object to that as incompetent—asking for a conclusion of law and fact.

Mr. HANCHETT: Now I ask you if you gave any attention to it, if you made any examination to ascertain where the shore line was? I mean as to what frontage under your plan of apportionment other portions of the shore would get, at that time?

A. No, sir.

Q. Let me ask you whether if a frontage was called for on that part of the shore which would be designated on this map as eight chains north, 75 degrees east, taking that part of the shore, wouldn't your method of apportionment entirely deprive that of any water frontage at all?

COURT: That is in lot 7?

Mr. HANCHETT: Yes. In your method you would not give that any water front at all; you couldn't draw a line in any manner to this equitable center and give that part of the shore any water frontage, could you?

A. Well——

Q. Just answer the question.

A. I had no method.

Q. Can you now, using this equitable center as the point of the line which you draw, can you give any frontage to that shore whatever?

A. I can't answer your question.

Q. If you should draw a line from the equitable center, so called, to either extremity of the shore line to which I call your at-
146 tention, such line would give no frontage at all to that shore, would it?

A. Do you mean that that line here as shown here would coincide with the——

Q. No, sir. I mean this: Suppose I owned this land here, 8 chains north, 75 degrees east; on the method of apportionment which you have adopted on this map, could you draw any lines to this equitable center from the extremities of my shore that would give me any water frontage?

A. It seems to me that would be assuming that I had the power of decision; that would be left for the courts to decide.

COURT: In other words, you think this might have to be divided in some other way?

A. Yes, sir; I have no opinion in regard to that.

Mr. HANCHETT: That means no lines can be drawn from the equitable center to the extremities of that shore that would give any water frontage?

—. No; it don't mean any such thing.

Q. Can you give any water frontage by going to that one equitable center.

A. You ask me if it wouldn't give it; I say, I am not giving any opinion at all.

Mr. CLARK: He is asking for a conclusion of law and fact, and we object to it as incompetent.

Mr. HANCHETT: I am asking if it does not appear from the map itself which you have prepared, that you cannot draw lines from the equitable center to the extremities of that shore and leave any water frontage within those lines?

A. I consider that a question for the courts.

COURT: Can you aid the court any; you couldn't start at this point, the east end of that?

A. No, sir.

Mr. HANCHETT: Then you would be depriving this property over here of its frontage, and you couldn't gain anything by starting there; you would recommend to the court to take some way

147 to get down here, wouldn't you?

A. I don't feel like recommending anything to the court.

Q. Let me call your attention to another portion of the shore; the question is as to whether what we call the equitable center, whether it accommodates all this surrounding territory and gives frontage to all, or whether it is not going to deprive some portion of this property of any frontage whatever?

A. I appreciate what you ask; it seems to me that it would be an answer the court only could decide.

Q. Let me call your attention to another part, using your map; taking the frontage that is represented by 10.50 chains south, 80 degrees west, which is a shore on the front of lot 5 in section 10; now using the equitable center which you have used in your map, and drawing lines from the two extremities of that shore, it would leave it no water frontage, would it?

A. It is possible, of course, to draw lines to leave it no frontage, and it is possible——

Q. You mean to take that frontage and apply it to that map, and also drawing lines on that map, it wouldn't give it any frontage?

A. Yes, we could make it coincide, and give it no frontage.

Q. Can you draw straight lines from the two extremities of that shore to the equitable center, and give that shore any water frontage; if you can, please draw it?

A. I don't know as I can.

Q. Wouldn't the same trouble exist in giving a frontage to the south shore, on that portion of the lake which lies on the southeast quarter of the southeast quarter of 10?

Mr. CLARK: We object to that as immaterial and incompetent.

Q. Designated by 6.50 chains, and 6 chains north, 80 de-

148 grees west; running a line from the two extremities of that shore to the equitable center would substantially leave no frontage there?

A. Yes, sir.

Redirect examination by Mr. CLARK:

Q. In regard to this cofferdam, was any such structure made for taking up the water at the east end of lake?

A. No, sir.

Q. Was the entire water from the east end taken up in any way, and carried into the flume aside from the one mentioned yesterday, was there any other?

A. Yes, sir.

Q. Where was that, describing it from this map Exhibit F?

A. By means of the use of launders on the south shore on the southeast arm of the lake, just north of lot 3, section 15.

Q. Where did those ditches carry the water so as to empty into that flume you have mentioned?

A. A portion of it would be emptied into the flume near the point marked drill-hole; near the south line of section 10, near the line marked drill-hole, where it strikes this south line of 10, at the angle in the launder.

Q. Do those ditches you have described and the other two mentioned yesterday cover the whole drainage on the south side of the lake and the east end?

A. Yes, sir; that is the watershed.

Q. Carrying into this flume?

A. Yes, sir; except what rainfall might fall between the ditch and the launder.

Q. Speaking about these five holes showing the value or the quantity of the ore, does the ore body lie, as a rule, between rock walls, foot and hanging?

A. As a rule; yes, sir.

Q. Was that the case with this formation we are talking about?

A. Yes, sir.

149 Q. Then does the drilling at intervals, drilling at one point and then at another along the formation, or across the formation, determine the body of ore there and quality, and continuation of the quantity?

Mr. HAYDEN: I object to that as leading.

A. Yes, sir.

Mr. HANCHETT: I would like to offer in evidence the map referred to by the witness as having been furnished to him by the engineer Hendrick.

(Marked Exhibit 1*a*.)

ALFRED KIDDER, sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination by Mr. CLARK:

—. Mr. Kidder, are you in the employ of the Pittsburgh & Lake Angeline Iron Company?

A. Yes, sir: in the capacity of agent. I have been in the employ of that company since 1864, in general charge of the company's affairs at the mines and business affairs, financial affairs, locally here at this point on Lake Superior; I mean general charge of the affairs of the company, mining operations and general business here.

Q. Anything to do with the sale or disposing of the real estate of the company in any way?

A. Not at all.

Q. Upon what territory has your company been mining, carrying on mining operations since 1864?

A. The north half of the north half of section 15, being
150 lots 2, 3, 4 and 5, commencing mining operations on lot 4 in the fall of 1863 I think. Lots 2, 3, 4, and 5 abut on the south side of Lake Angeline, which lake is located in sections 10, 11, and 15, township 47 N., range 27 W. We began our mining by surface work on the side of the hill. The hill was quite close to the lake at the point where it was opened. As we mined into the side of the hill, the waste was carried north and dumped into Lake Angeline; the dump maintaining about the shore level as it was carried out into the lake, in that way making ground out into the lake about the level of the shore. We continued making this territory with this dump as we mined from the waste out into the lake until 1884, possibly 1885. I think we did put some refuse into the lake in 1885, but am not sure. We had commenced sinking at that time. I don't think we were mining in the old pit up to that time. After that time, the operations were conducted under ground. I don't mean we were continuously dumping from that time to 1884. I mean to say that the last time we put in material into the lake was in 1884.

Q. I show you a map marked "Exhibit F" of the territory north of the south line of section 10, and west of the central line of that section, and ask you to look at the territory that is marked 3.35 acres just north of lot 4 of section 15, and the territory marked 1.25 acres just north of lot 5 of section 15, and ask you to state what that is?

A. That is a part of that refuse dump, as we call it; that was a part of what was taken out of the pits and carried over there north of the pit on a level with the lake shore until it reached that boundary, from the pits marked open pits, appearing on lots 4 and 5 of section 15 referred to. I should think that we filled up the lake and made territory of about five
151 acres north of the south line of section 10, and we erected buildings on that territory. They were a carpenter shop, erected I think in 1884; it was partly on the made ground and partly on the section line. It was a building worth about $1,800 or $2,000; a frame building covered with corrugated iron. I don't know the exact size; I should think something like 30 x 60 or 70 feet. It was a well-constructed building, designed for housing tools. We also constructed a blacksmith shop the following year, which was put over the section line of 10 on that made land, on the territory just north of lot 4, section 15. It was a frame building, brick between the studding, covered with corrugated iron outside on the roof and sides. The building cost somewhere about $2,000. It was a eavy frame roof. We constructed other buildings one this made territory north of the south line of section 10. There was a building moved there. There was a small wooden blacksmith shop that

was built in the first place on section 15, and moved over onto section 10, to serve as a blacksmith shop and supply-house. I think it was put there in 1885. It was a small building 20 x 24, something of that sort, a frame building. There was also an old pump-house, engine-house, placed on that land over the line, I think two or three years afterwards in 1887; also a powder-house and an ice-house. They were north of lot 4, section 15 over the line. This carpenter shop has since been moved south. That was also moved south of the section line, both the carpenter shop and the machine shop were moved over to places south of the section line. They were moved in the latter part of 1887.

Q. Did you receive any information, or advice or suggestion, which caused you to move those over, and what was the first you heard that led you to do that?

152 Mr. BALL: We take an objection to that for irrelevancy and incompetency.

Mr. HOYT: We take the same objection.

A. I had a conversation with Mr. Mann, of Milwaukee, on the train, that a decision had been recently rendered by the supreme court of this State, which enabled parties, or allowed parties owning any part of a subdivision, to fill out the lots on those subdivisions abutting on an inland lake; and from looking that thing up, and looking at the map, and thinking it over, I saw that if it were true, it would give that territory north of that line to the Lake Superior Iron Company; and I then went to Mr. Clark for an opinion in the matter.

Q. Did you find out from Mann what decision was referred to by him, or did he say anything to you about it?

Mr. HOYT: The same objection is continued.

A. No, he did not; he said the decision would be found in the Northwestern Reporter, but he didn't tell me, I think, what it was; in fact, I know he didn't.

Q. You say you went to Mr. Clark for an opinion in regard to that decision?

A. I asked for a written opinion, and I was referred to the decision and what it was. The decision was Clute *vs.* Fisher, appearing in 65th Michigan; and the information which I received from Mr. Mann, and from the opinion I got from Mr. Clark, caused me to move the shops over the line.

Mr. HOYT: We object to that as incompetent and immaterial.

Mr. BALL: We make the same objection.

Mr. CLARK: What did you do it for?

153 A. Because I considered the buildings too valuable to leave in a position of that kind where the ownership might be jeopardized; they were in some jeopardy if they remained there.

Q. Did you move any other buildings except the machine shop and carpenter shop?

A. No, we did not; they are still there, the powder-house and the

other blacksmith shop, the cheaper one, and the other buildings I have mentioned. We have been in the occupation of that made territory by these buildings ever since.

Q. Now since this learning of this decision in Clute *vs.* Fisher, what has been your understanding and supposition with regard to the mode of division of this lake?

Mr. HOYT: We object to that as incompetent.

Mr. HANCHETT: We object to that as incompetent.

Mr. CLARK: Up to the decision of Ice & Coal Co. *vs.* Ice & Coal Co., 102 Mich.?

Mr. HOYT: We object to that question as incompetent, irrelevant, and leading.

Mr. CLARK: Up to the time you learned of the decision in Ice & Coal Co. *vs.* Ice & Coal Co., 102 Mich.?

Mr. HOYT: The same objection is continued.

A. That it restricted our ownership to the north line of section 15 in the bed of Lake Angeline.

Mr. CLARK: When did you learn of the decision of the supreme court of Michigan in Ice & Coal Co *vs.* Ice & Coal Co., in 102 Mich.?

Mr. HANCHETT: I object to that as immaterial.

Mr. CLARK: Deciding otherwise, or overruling the decision of Clute *vs.* Fisher.

Mr. HOYT: Our prior objection is continued.

A. I heard of something of that kind, that there had been a decision, and I went to you and got an opinion February 8, 1896.

154 Q. Did you at that time hear this decision read with regard to this matter, the holding of the supreme court in regard to the dividing up of inland lakes among the abutting owners?

Mr. HOYT: The prior objection is continued.

COURT: Yes, all these objections may as well relate to this matter.

A. Only as given in your opinion, Mr. Clark.

Q. You saw the opinion?

A. I read your opinion carefully.

Q. I mean the opinion in 102 Mich., did you look it over?

A. No, sir; I did not.

Q. Now did you, when learning of this fact, report to your company these decisions that were made by the Michigan court?

Mr. HOYT: That is objected to as leading, and also as irrelevant and incompetent.

Q. When did you notify your company of that fact, if you did at all?

A. Well, I don't know exactly; I did it within a short time; I should suppose they were notified here some time within a few days after getting your opinion.

Q. You have heard the statements with regard to the driving of

this drift by the Cleveland Iron Mining Co. from the north side of the lake across and through a diorite division into the south body of ore south of that diorite division, under the lake, didn't you?

A. Yes.

Q. Have you in the carrying on of this mining, had personal oversight, to understand all the mining operations?

A. Well, generally, I have.

Q. You have been in the habit of going into the mines and examining the work?

A. Yes, but of course the work has been conducted directly by Captain Walters, but I have been cognizant of everything that has been done, and have, as I say, done it.

155 Q. Have you ever been down in the shaft of the Cleveland Iron Mining Co. that has been described here as lying north of this lake?

A. I never went down that shaft, no, sir.

Q. Do you know anything about whether there is a dividing diorite formation separating the south ore body from the north ore body, passing about east and west under the lake?

A. I have never been through that cross-cut to see that rock; I have seen the rock on top; there is an outcrop.

Q. So you mean to say there is such a formation?

A. Yes.

Q. Reference has been made to the fact that this lake was pumped out by the complainant and defendants jointly, and that a contract was made in regard to that matter; I show you this paper, and ask you if you know anything about it, and if that was the contract? (Paper shown witness.)

A. Yes, I was familiar with this contract at the time it was made.

Mr. DUSTIN: We admit that it is the contract, and you need not spend any time on it.

It is dated the 17th of March, 1892.

Q. Who carried on the negotiations on behalf of the complainant with the defendants, which resulted in the making of this contract, the entire negotiations?

A. I did, with Mr. Mills, and with Mr. Mather. I mean Captain Mills of the Cleveland Iron Mining Co. at that time, and Mr. Mather, president of the company. I had some conversation with Mr. Mather on the subject as to some modifications of the contract. I had nothing to do with the negotiations with the Lake Superior Iron Co. at all. I carried it on entirely with Mr. Mills, and Mr. Mills negotiated with them.

Contract offered in evidence and marked Exhibit I, and is as follows:

156 This agreement, made this 17th day of March, A. D. 1892, by and between the Cleveland Iron Mining Company, first party, the Lake Superior Iron Company, second party, and the Pittsburgh & Lake Angeline Iron Company, third party, all cor-

porations organized under the laws of the State of Michigan, witnesseth:

First. That whereas, the three parties to this agreement severally own all the land surrounding Lake Angeline, in the county of Marquette, State of Michigan, and, iron ore having been discovered under the bed of said lake, it has become necessary to pump out the water of said lake and permanently thereafter drain the bed thereof, in order that each of the parties hereto may economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to.

Second. And, whereas one B. C. Howell, prior to the date of this contract, had a large pump, suitable for such work and proposed to said first party to contract to pump out said lake and to sell said pump and necessary appliances, all for the sum of thirty-three thousand dollars ($33,000.00), provided he could begin operations immediately while firm ice remained in said lake, so as to furnish the necessary support for placing the proper timber-work in position; and whereas, said first party, after communicating with said second and third parties and getting their approval, has entered into a contract with the said Howell to pump out the water of said lake and to purchase said pumping apparatus and appliances for said sum, thus making a large saving in the cost thereof; and,

157 whereas the cost of the continuous drainage of the bed of said lake, after the water thereof is pumped out, is now impossible of ascertainment, and the parties hereto are desirous of fixing the proper proportion of expense, both of the purchase of said pumping apparatus and of the said pumping out of said lake, and of the cost of the continuous or permanent drainage of the bed thereafter, to be borne by each, the same being for the mutual benefit of all.

Now, therefore, the parties hereto, in consideration of the premises and of mutual considerations received by each from each, the receipt of which is hereby respectively acknowledged, hereby agree as follows:

Said first party agrees:

First. To bear and pay eight-fifteenths ($\frac{8}{15}$) of the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake, under the arrangement with the said Howell, to wit: the sum of seventeen thousand, six hundred dollars ($17,600.00) and eight-fifteenths ($\frac{8}{15}$) of any additional cost which may be necessarily incurred in the premises, and will also bear and pay one-fifth ($\frac{1}{5}$) of the value of said pump and appliances after the lake is pumped out, which one-fifth ($\frac{1}{5}$) thereof is to be deducted, as hereinafter provided, from the amount to be paid by said third party.

Second. After said lake is once pumped out by said Howell, to maintain and operate the said pumping apparatus and plant for the continuous and permanent drainage of the bed of said lake, advancing all necessary expenses for such maintainment, operation and repairs, and, at the end of each calendar year, to pay and bear such a proportion of the cost thereof during the year preceding, as the

total number of tons of ore mined and produced by said first
158 party from that portion of the said lake bed belonging to it, during said year, bears to the total number of tons of iron produced and mined during such year by said first and second parties jointly from the bed of said lake, and further, to bear and pay two-thirds ($\frac{2}{3}$) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

Said second party agrees:

First. To bear and pay four-fifteenths ($\frac{4}{15}$) of the entire cost of the purchase of said pump and apparatus, and of the pumping out of said lake under the arrangement with the said Howell, to wit: the sum of eight thousand, eight hundred dollars ($8,800), and four-fifteenths ($\frac{4}{15}$) of any additional cost which may be necessarily incurred in the premises.

Second. To bear and pay to said first party, on settlements to be made at the end of each calendar year, such a proportion of the entire cost of maintaining, operating and repairing the plant for the permanent drainage of said lake bed, as the total number of tons of iron ore produced and mined by said second party, from that portion of the lake bed owned by it, during such year, bears to the total number of tons of iron ore produced and mined by said first party and said second party from the entire lake bed during such year, and also to bear and pay one-third ($\frac{1}{3}$) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

Said third party agrees:

First. To bear and pay three-fifteenths ($\frac{3}{15}$) of the entire cost of the account to be paid to the said Howell under the arrangement of said first party with him, to wit: three-fifteenths ($\frac{3}{15}$) of
159 the said thirty-three thousand dollars ($33,000), namely, the sum of six thousand six hundred dollars ($6,600), and three-fifteenths ($\frac{3}{15}$) of any additional cost which may be necessarily incurred in the premises, less one-fifth ($\frac{1}{5}$) of the value of said pump and appliances purchased from the said Howell under the arrangement with him, the value of which is to be estimated as soon as the first drainage of said lake is completed.

Second. To erect and maintain a proper and sufficient flume, so constructed above the present water level of Lake Angeline, as to divert and carry away all the surface water or other surface drainage which would otherwise come into the present bed of said lake from all the land lying above the present water level of said lake, and south of the south line of section ten (10), as projected through said lake, and also to run into said flume any and all water which the said third party may pump from its mine or mines; which said flume said third party agrees to maintain and keep in repair and in successful operation, diverting such drainage from the bed of said lake until the iron ore to which said third party is entitled, lying on, in, or under the portion of the bed of said lake lying south of the said south line of said section is mined and exhausted, and then, to turn over said flume in good repair to the said first and second parties hereto without charge, and to allow them, thereafter, to oper-

ate and maintain the same for the purpose of continuing said drainage, giving the employees of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, allowing them to make such alterations in said flume, and in the direction of the same, as may be necessary to successfully accomplish such drainage.

160 It is mutually agreed, by and between the parties hereto:

First. That each of the parties hereto will respectively pay on demand, their proper proportion of the amounts due from each, as aforesaid, under the arrangement with the said Howell, when and as called for by W. G. Mather, of Cleveland, Ohio, who is hereby appointed the trustee of all the parties to this agreement, to collect the amount due from each, and to pay the same to said Howell in accordance with the terms of his contract.

Second. That, in case of any dispute arising between the parties hereto, either under this contract or in regard to their joint operations in or about the drainage of the bed of said lake, all such matters of dispute shall be settled by five (5) arbitrators, one (1) to be chosen by each of the parties hereto, and the other two (2) to be selected by the arbitrators so chosen, an award in writing of any three (3) of said arbitrators to be binding and final upon the parties hereto. In case of a dispute, however, between two (2) only of the parties to this agreement, but three (3) arbitrators shall be chosen, one (1) by each of said disputing parties, and the other by the two (2) so chosen, and the award in writing of any two (2) so chosen shall be binding and final upon the parties between whom such dispute has arisen.

Any party to this agreement desiring such arbitration shall have the right to the appointment of arbitrators in the manner above provided, by serving a ten (10) days' written notice of its intention to so arbitrate on the other party or parties to this agreement, who shall each respectively within the time limited in said notice, select its arbitrator, and, in the event of its failure so to do, then

161 the party desiring said arbitration shall have the right to select an arbitrator in lieu of the one or ones failed to be appointed by the other party or parties, and an award in writing of a majority of the arbitrators so chosen shall be final and binding upon the parties to such arbitration.

Third. This agreement shall extend to and be binding upon the successors, assigns and grantees of the respective parties hereto, precisely as if said respective successors, assigns and grantees had been specially designated herein.

It is mutually agreed, by and between the first and second parties hereto, as follows:

First. That the said first party, through its proper agent or employés, shall keep an accurate and exact account of the cost of operating and maintaining said pumping plant and appliances for the permanent drainage of the bed of said lake, which accounts shall, at all reasonable times, be open to the inspection of the said second party through its agents or employés, and that, before any improvement or other machinery or appliances are purchased for the pur-

pose of the permanent drainage of said lake, the said second party shall be consulted concerning the purchase thereof, and its approval obtained; and, on or before the tenth day of January of each calendar year, a written statement of the cost of maintaining and operating said drainage plant and appliances for the preceding year shall be sent to said second party by the said first party, together with a full, complete and accurate statement of the total number of tons of iron ore mined during the preceding year from the bed of Lake Angeline by said first party, and, on or before the said tenth day of January, of each such year, the said second party shall send to the said first party a full, complete and accurate statement
162 of the number of tons of iron ore mined or produced by said second party from the bed of Lake Angeline during the year preceding.

And the said second party agrees, within ten (10) days from the receipt by it of said account, to pay to the said first party its proper proportion of the cost of maintaining and operating said permanent pumping and drainage plant, as above provided, and also, on demand, one-third ($\frac{1}{3}$) of the cost of such other and additional appliances and apparatus as may have been previously agreed on by the first and second parties hereto, as above provided. Provided, however, that if, when said accounts for the permanent drainage during any year are rendered to said second party, said second party is willing, for the succeeding year, to undertake the permanent drainage of said Lake Angeline at a less cost than that incurred by the said first party for the year last preceding, the said second party shall thereupon have the right, during the succeeding year, to take possession of said permanent pumping and drainage plant, together with all appliances, and operate and maintain the same itself, permanently draining the said lake bed during such year, advancing all the cost thereof, in which event the said second party shall keep and render the accounts above required to be kept by the said first party, and the said first party, within the time above limited, after the expiration of any such year, shall *shall* pay to the said second party its proportion of the cost of such permanent drainage, in the manner and within the time above provided, and if, at the end of any such year, the said first party is willing to undertake the permanent drainage of said lake for the next succeeding year at a cost less than that incurred by the said second party, it shall
163 have the right to do so, as above provided, it being understood that either, at the end of any year, shall have the right to operate said permanent drainage plant for the next succeeding year, provided it is willing to guarantee to do so at a less cost than that incurred by the other party during the year next preceding.

If desired by either said first or said second party, the respective statements of the amount of ore respectively mined and produced by each in each year from the respective portions of the bed of Lake Angeline owned by each party, shall be under oath, and sworn to by the agent or employés of each party having knowledge of the facts.

In witness whereof, the parties hereto have caused these presents

to be duly executed in triplicate by their respective officers, and their respective corporate seals to be attached, as of the day and year first above written.

THE CLEVELAND IRON MINING COMPANY,
By WM. G. MATHER, *President.*

[CORPORATE SEAL.]

Attest: FRED A. MORSE, *Secretary.*

Signed, sealed and delivered in presence of—
L. G. MADISON.
FRANK B. WHITE.

THE LAKE SUPERIOR IRON COMPANY,
By G. W. R. MATTESON, *President.*

[CORPORATE SEAL.]

Attest: A. C. TENNEY, *Secretary.*

W. B. BOSSON.
CHAS. HALL ADAMS.

164 THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,
By JAS. LAUGHLIN, JR., *President.*

[CORPORATE SEAL.]

Attest: W. G. POLLOCK, *Secretary.*

W. C. QUINN.
WILLIAM F. ROBB.
A. C. DURTIN.
C. A. JUDSON.

STATE OF OHIO, *Cuyahoga County,* } ss:

Before me, Alton C. Dustin, a commissioner of deeds for the State of Michigan, residing in the city of Cleveland, county of Cuyahoga and State of Ohio, personally appeared William G. Mather, president, and Fred A. Morse, secretary of the Cleveland Iron Mining Company, to me personally known and known to be such officers respectively, who then and the acknowledged that they duly executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of said corporation, and the free act and deed of themselves as such officers.

In witness whereof, I have hereunto set my hand and official seal, this 17th day of March, A. D. 1892.

[SEAL.]

ALTON C. DUSTIN,
Commissioner of Deeds for Michigan,
Residing in Cleveland, Ohio.

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss:

Before me, Chas. Hall Adams, a commissioner of deeds for
165 the State of Michigan, residing in the city of Boston, county of Suffolk, and State of Massachusetts, personally appeared G. W. R. Matteson, president, and A. C. Tenney, secretary of the Lake Superior Iron Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of said corporation, and the free act and deed of themselves as such officers.

In witness whereof, I have hereunto set my hand and official seal, this sixth day of July, A. D. 1892.

[SEAL.] CHAS. HALL ADAMS,
Commissioner of Deeds for Michigan,
Residing in Boston, Mass.

STATE OF PENNSYLVANIA, }
Allegheny County, } ss:

Before me, William F. Robb, a commissioner of deeds for the State of Michigan, residing in the city of Pittsburgh, county of Allegheny, and State of Pennsylvania, personally appeared James Laughlin, Jr., president of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such president, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such president.

In witness whereof, I have hereunto set my hand and official seal this twentieth day of August, A. D. 1892.

[SEAL.] WILLIAM F. ROBB,
Commissioner of Deeds for Michigan,
Residing in Pittsburgh, Pa.

166 STATE OF OHIO, }
Cuyahoga County, } ss:

Before me, Alton C. Dustin, a commissioner of deeds for the State of Michigan, residing in the city of Cleveland, county of Cuyahoga and State of Ohio, personally appeared William G. Pollock, secretary of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such secretary, who then and there acknowl-ed that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such secretary.

In witness whereof I have hereunto set my hand and official seal this 22nd day of August, A. D. 1892.

[SEAL.] ALTON C. DUSTIN,
Commissioner of Deeds for Michigan,
Residing in Cleveland, Ohio.

Q. Now in this contract it appears that certain portions of the expense was to be paid by each; one-fifth by your company, was it not?

A. Yes.

Q. And three-fifths by the Cleveland Iron Mining Co., wasn't it?

A. Yes; I think so.

Q. And the balance by the Lake Superior Iron Co., or whatever this sets forth?

A. I am not positive as to this; I know we paid one-fifth, and the Lake Superior paid—I think we paid three-fifteenths, the Cleveland eight-fifteenths, and the Lake Superior four-fifteenths; that is my impression, I may be wrong.

Q. What was the occasion of providing in this contract that the complainant was not to pay for the permanent drainage?

Mr. HOYT: I object to that as incompetent and immaterial.

167 Mr. BALL: We object to it for the same reason.

A. I can tell you that by repeating the conversation I had with Mr. Mills, at the time we made that arrangement: there was a paper from which——

Mr. HANCHETT: We object to that conversation.

A. We were to pay our proportion I suppose, the same as we paid on the whole drainage, on the first drainage, on the permanent drainage, and I objected to that to Mr. Mills, on the ground that it would be entirely unjust.

Q. When you say a paper, you mean a proposition?

A. Yes, and given me by Mr. Mills, I suppose—on the ground that our ore being in a minor fold of less depth than theirs, theirs being in a heavier fold to the north, the two folds of ore being separated by the division of diorite rock spoken of, which was quite impervious to water, and very solid compact rock, that the pumping of that main fold would do us no good at all, the main fold to the north of the diorite; the pumping of that fold would not benefit us at all; in fact, we would have to pay for that and to pay for all the pumping of our own beside.

Q. What do you mean by pumping your own besides?

A. Of our own fold; our ore was in a minor fold separate.

Q. Lying south of the diorite?

A. Yes, like two corrugations, one larger and deeper than the other. Mr. Mills assented to the justice of that proposition. Now I said I will propose to take all the water from the south side of that lake, all that water shed, or construct a dam at the east end to cut off all the water coming down that valley, and from that dam carry a ditch with suitable flumes where necessary along the south shore of the lake, to take all the water coming down that side hill,

168 and put it into the outlet, and that from there all the water we pumped from our mine would go into that flume; Mr. Mills said, "If you will do that we will be entirely satisfied; we will consider that perfectly satisfactory."

Q. That there would be an equitable division of the expense of taking care of the drainage?

Mr. HOYT: The same objection.

A. Yes.

Q. Did you put in such flume and such ditches?

A. Yes, sir; as described by Mr. Bradt in his testimony. Of course we agreed to maintain them, as well as put them in. It was an expensive piece of work putting them in in the first place, costing over $6,000, and it has cost us a great deal of money since; it needs constant expense.

Q. Doing what?

A. The ditch where it was first carried around that cave we had to substitute flumes, and very expensive ones, and we have had to do it again, and have spent something like four or five thousand dollars more, I should think fully that since that time, and now we are obliged to do it again; that is, we will now have to spend several thousand dollars more, because the same thing is happening, it is going down; we have got to keep constantly changing flumes and drains.

Q. As to the proportion of water that would flow into the lake from the water-sheds, what do you say as to that which you take care of on the south, as compared with that on the north?

Mr. HOYT: The same objection continued.

Mr. BALL: The same objection, as immaterial and incompetent.

A. I should say that more than half the water would come in on that east end, and south side, decidedly.

169 Q. In what does the water come in from the east end?

A. There is a great valley that runs way up there, and rather narrow at the mouth of that lake, but it spreads out and covers a great territory, and the water-shed is quite a distance back; and we take the water that comes down the valley as well as that shed from the hill, and that hill is not only very high, but it is quite a wide hill, and it runs back a good ways from the lake, that is, compared with the hill on the north side. The flume that we constructed was about four feet wide by three feet deep, I think; it was a very large flume, made to cover all contingencies; made of three-inch pine, three-inch dressed, with iron tongues. There was no expense in the way of keeping it up from rottage; it was well made, of good material. The high expense comes from having to abandon parts of it, and substituting in other places.

Q. In what way is the water taken care of and carried off after it is pumped on the north side of this diorite division you mention, by the defendant, in what way is it carried off and away from this lake territory?

A. From that surface pump they run five or six hundred feet due south and empty into our flume. This was by our consent. They did nothing towards keeping up this flume.

Q. If that mode of drainage for the north portion of this lake,

north of this diorite, was not offered to them by the complainant, could they have drained it in any other way as conveniently?

Mr. HOYT: That is objected to as incompetent and immaterial.

A. Not so inexpensively; it would cost more.

Q. How much further would they have had to run with the flume to have carried off the water, if they had not entered into your flume?

170 A. I think about 700 feet; I think the whole distance from the scow to the outlet is 1,300 feet; I think they would have to have gone 700 feet further.

Q. On what territory would they have had to have gone in carrying off the water if they had had to put this flume 1,300 feet that you mention?

A. It would have been on the Lake Superior Iron Co.'s territory.

Q. You speak of the upper east end draining into your flume?

A. Yes.

Q. What opportunity would they have had to carry off the water if it had not been taken into your flume?

A. They would have to carry it down to the outlet to dispose of it, of course, the full length of the lake.

Mr. HAYDEN: These leading questions are seriously objectionable.

Mr. HOYT: I understand the court means to continue our same objection.

COURT: O, yes go on, Mr. Clark.

Q. Then the flume they would have been required to put in if you had not given them this right to go into this other flume of yours, would have necessitated a flume the full length of the lake to carry it off at the outlet?

Mr. HOYT: I wish it understood that the objection covers leading questions as well.

COURT: Yes. He has already stated that.

Q. What would have been the length of such a flume that they would have been under the necessity of putting in, if it hadn't flowed into your flume?

A. It is over half a mile from that point to the lake, from where they dumped into the outlet from the lake, I think it is considerably over half a mile.

Q. What would be expense of such construction, how would it have corresponded with the construction of the flume put in, if they had had to build it?

171 A. Well, they could carry it with a pipe for less money, I suppose, than to pump it into the outlet, than it would cost to put it into that flume. How much less, I really can't tell.

Q. In making this contract, you say that these considerations you have stated entered into the consideration in exempting your company from doing the permanent pumping of the water north of the diorite division?

A. The consideration of the ditch and flume?

Q. Yes.

A. Yes. I have heard the testimony in regard to the opening of this south deposit just over the south line of 10, and upon this territory which is now in the disputed limit north of the dotted lines on this Exhibit F. I understand that at the time, or before mining was done by the Cleveland Iron Mining Company Captain Walters had a talk with the officers of the Cleveland Iron Mining Company about the matter. I did not have a talk with Captain Mills. I think it was in 1889, I requested Captain Walters to tell Mr. Mills of some ore we had found, which we were pretty sure would lead onto that territory.

Mr. HOYT: We move to have that answer stricken out, as incompetent.

Mr. CLARK: State what the fact is, as to your discovering ore, and where do you refer to?

Mr. DUSTIN: The same objection.

A. We had a diamond drill-hole about 30 or 40 feet south of the quarter post on the center line of 15, and it went down at a pretty high angle to the south; it went through very fine blue hematite ore, as I remember, went through 30 or 40 feet of it, quite a little deposit of it; and from the nature—from what we knew of the general formation there, we were very sure that it must go
172 over onto the Cleveland Company's land; we thought it not of much value to us, that we would have but very little of it, but the Cleveland would have a large body of it, that the chances were they would have, and requested Captain Walters to see Mr. Mills and tell him about it; tell him that it would go to the north of the south line of section 10, and extend from the north and east. We knew it was lying pretty flat from the way we went into it. We could not tell which way the ore formation trended by the drill-hole; we knew that anyway; we knew the formation, was familiar with it all along there. It was trending to the east, pitching to the north, as it is called. I did not have a conversation with Captain Mills after directing Captain Walters to inform him, as to whether he did so. We began our shaft after drilling the hole in 1889 and 1890, but it was not because of that drill-hole. We didn't consider that it indicated anything very positive; that shaft which we sunk was done for the purpose of cross-cutting that valley there at a depth—we had been drilling for a long time along the shores, and we couldn't get down; we met ground so badly caved so we couldn't get a hole down at all, and I finally told the Captain I was willing to take the bull by the horns, as it were, and sink a shaft down there, and cross-cut, and then if we didn't find anything in that cross-cut—I felt so sure there was ore up that valley that we were willing to spend the money.

Q. I show you the point on this Exhibit F south of the south line of section 10, marked shaft-house?

A. That is it. That is the point on lot 3 section 15. That was called the 16th post on the line, right on the shore of the lake. We

got as near the lake as we could. We started sinking the shaft in
1890; and we commenced driving in the spring of 1891. We
173 struck ore I think in the shaft, I think it was the first of May,
1891, or thereabouts, May or June, 1891. We went through this ore which proved to be the north side of the fold we had. This was only a few feet from the south line of section 10. After putting that shaft down, we put a drift across, and cross-cut, and we struck the north side of a fold, and then drilled and struck at a distance of about 330 feet, I think it was, the south side of that fold; that gave us the knowledge that we had a regular fold of ore there which we believed to be continuous down as well as in length; then we drifted to the west of the north rim of that fold until we got up near the line. That indicated very strong probabilities that the ore would continue on over the line into section 10; we felt very sure of it. I got this information along in 1892. We had progressed far enough then to know that it would probably go over the line.

I heard the testimony of Mr. Bradt that Captain Mills was given permission by the complainant to drill from the bottom of our workings, which I have described, to the north. I remember that. Captain Walters had a conversation, I think, with Mr. Mather under ground, and he spoke to me about it, and I said I should be very glad indeed to have that done, and we were willing to furnish the air for the Cleveland Company, and we would keep an account of it. By that I mean the compressed air for them to use with their drill in this drift. We didn't make any charge for it, but we kept an account of it on the books. Shortly before that I had a conversation with Captain Walters, and we decided in our own minds that ore — certainly going over there, and they undoubtedly had a large
body of it, and I requested him to tell Mr. Mills of it, give
174 him the information, and give him all the facilities they
wanted for examining it. I supposed at that time that the section line formed our north boundary, and my first information that that was not so was when I got your opinion in February, 1896. I then gave notice to the defendants that they were upon our territory, the territory of complainant. There was notice given to both of the defendants, I think it was October 29th, 1896.

Q. As this work has been progressing—that is, carried on by the Cleveland Iron Mining Company south of this dotted line, marked north 51 degrees, 49 minutes west, have you noticed the stock piles, and the character of the ore that has been taken out of there?

A. That came out of the Cleveland side?

Q. Yes.

A. No; I have not. I have not been near enough to know anything about it.

I have not examined the ore. I have been informed by mining experts as to the quality of the ore, and have understood it was very rich ore, a high-grade Bessemer ore. I have an idea of what such ore ought to be worth from experience; what it costs to mine the same kind of ore. I should think you could mine it for 55 to

60 cents, and put it in the stock pile, charging up nothing for preparatory work or general expense.

Mr. HOYT: We still object to this as irrelevant and incompetent, and wish to be understood as having maintained our objection all the way through.

COURT: Very well.

I think the Cleveland Iron Mining Co. began the mining in this territory south of this dotted line some time in the spring of 1895.

Q. Now, what expenses would there be, general expenses above the 55 or 60 cents, you have mentioned, as cost per ton that should be added to cover all other expenses in connection with the
175 mining; what are those expenses?

A. All of the things that go into the fixed cost, the salaries of the officers by the month, and taxes and repair account.

Q. Do you mean the men working in the mine?

A. No; I mean the agent, superintendent, and foreman, and mining captain, and everybody who is generally employed around a mine, head machinist, and head blacksmith, and all those men, they make up a fixed cost.

Q. Taxes and things of that kind?

A. Yes.

Q. What would you say that ore would cost in 1895, with those expenses added?

A. I think $1.10 would be a very reasonable estimate, an outside estimate.

Q. What was the selling price of such a quality of ore in Cleveland at that time during that year, the average selling price?

A. I think it was $2.90 for ore of that grade.

Q. What would be the profit upon that ore, or was there profit on such ore that year at that selling price, in Cleveland, profit to the company?

Mr. HOYT: We object to that also because it calls for a conclusion of the witness, in addition to our other objection.

A. It would be in the neighborhood of 60 cts. I should think, at $1.10, and rail freight 32 cts., and lake freight. Railroad freight to Marquette, and the lake freight; it depends on what you put it in at. That year it was about 75 cts., and probably 10 cts. for general expenses, insurance and expense of the sale. That would be 63 cts. profit at those figures. The selling price of that quality of ore in 1896 was $4 a ton, and the expenses about the same as the year before, and the profit is the difference.

I never saw their stock piles to notice them. We began
176 mining on these lots 2, 3, 4 and 5 in the fall of 1863. We began to strip at that time, and our company has been in continuous possession of all of these lots, carrying on that business since that time.

Cross-examination by Mr. HANCHETT:

I think the carpenter shop was built in 1884; and the machine shop in 1885, and the other buildings were built about the same time, 1885, a little warehouse and powder-house. The machine shop was north of the section line. The carpenter shop was on the line, part on 10, part on 15, and the small buildings were put north of the line in 1885. At that time they were built north of the line, because I understood that our property extended north of the line by means of our riparian rights. The water of the lake had previously extended south of the line, and we have built up by our workings from the mine. We then understood that our rights extended north of the line because of the riparian ownership of the shore. That remained so until we were informed by the decision of the supreme court, to which I have referred, when I asked Mr. Clark his opinion about it, and he advised me in substance that our ownership stopped at that line, with the north line of the section. We then, as a matter of precaution, moved those buildings mentioned to the south of the line, in order that we might save them, in case Mr. Clark's opinion proved to be correct. I did not make any further inquiry as to our rights, not at that time. I accepted Mr. Clark's opinion as final on the subject, so far as to govern my actions. I understood it to be only a matter of opinion. I understood it to be his opinion, but that the decision was definite by the supreme court.

177 Q. So long as the matter remained in an opinion, it was a matter of doubt, wasn't it?

A. Yes.

Q. You were also aware of the fact that the courts sometimes change their opinions, were you not?

A. I have very frequently thought that with reference to this very thing, the supreme court might change sometimes.

Q. And rather than investigate any further, or raise any question about it, you concluded to accept the opinion as rendered by Mr. Clark, is that it?

A. Yes, that is so.

Q. When, on the other hand, Mr. Clark informed you that the supreme court had changed its opinion, Mr. Clark also changed his?

A. I don't understand your question.

Q. I understood you to say you were afterwards informed by Mr. Clark, that the supreme court had changed its opinion?

A. Yes, he gave me an opinion citing authorities, which I thought was sufficient. I didn't consider it Mr. Clark's personal opinion at all; I considered it a report on the action of the supreme court.

Q. In the last case?

A. In the last case as in the other case.

Q. You didn't consider it Mr. Clark's opinion at all?

A. I say I didn't consider it was Mr. Clark's individual opinion, his personal opinion; it was a statement of the action of the supreme court which he gave me in his opinion, and which I could read for

myself; I could form an opinion on the condition of the law when I read the extracts from the supreme court's decision in the case.

Q. I understood you, in answer to Mr. Clark's question, that while you read Mr. Clark's opinion you didn't read the court's opinion?

178 A. I didn't read the full text; he gave me an abstract of the case in his opinion.

Q. So you acted upon what Mr. Clark, or what the court said?

A. The whole thing; I formed my judgment on his written opinion to me.

Q. When Mr. Clark informed you that the supreme court had changed its attitude on the subject, then you changed, is that it?

A. I changed my idea with regard to what was the law.

Q. Did it any longer remain in doubt to you?

A. No.

Q. Then the conclusion you reached was, that the law was one thing yesterday and another thing today?

A. Yes; that is not very extraordinary, that happens very often.

Q. The whole thing was an uncertainty, was it?

A. It was a certainty as to the condition of things at that time.

Q. Then the action you took was to save your buildings succeeding the first opinion?

A. Yes.

Q. And your last action was to save your ore succeeding the last opinion?

A. Exactly.

Q. Now I understand you to fix the date when you were first informed of the decision in Ice Co. case as in February, 1896?

A. Yes.

Q. And that you gave notice to the defendants on the 29th of October, 1896, of your claimed rights north of the north line of section 15?

A. Yes, sir.

Q. Where were you yourself during this period from February, 1896, to October, 1896?

A. I was here, I think, looking after the business of the company the most of the time. Our office is located at the foot of Lake Angeline. I was there frequently. It is in the neighborhood of where the operations were being carried on by our neighbor, the

179 Lake Superior Iron Co. I knew what they were doing during that period of time.

Q. How long after you heard of the case of Clute *vs.* Fisher on your visit to Marquette, before you applied to Mr. Clark for an opinion about the decision?

A. I think it was quite soon, immediately, within a week or so; I don't remember now. I could not give the date when I heard of it first; I think it was in 1887; I could not give the month. I do not remember what part of the year, spring, fall, winter or summer.

Q. When did you first hear of the decision in the ice case?

A. I heard there was a decision, that the supreme court had changed its view of this case, by making another decision which

changed them there. That came to my knowledge some time the last of December, the 30th of December, 1895, and then I went to Mr. Clark. It was not in December, 1894, because it was made after, in January, and it must have been a week or so before that I had heard of the thing, and he took some time to look it up and to write his opinion, and he gave it to me on February 8, 1896, so that I know it was about the 1st of January, 1896, I am confident of that.

Q. When you made this pumping contract, you then understood and acted upon the understanding also, that your premises stopped with the north section line of section 10?

A. Yes.

Q. The terms of the contract were finally settled in view of that opinion which you held in regard to your property rights?

A. That is right.

Q. I observe that Mr. Clark in asking you his questions has referred to the diorite division between the two bodies of ore instead of the section line?

A. Yes, sir.

Q. Those two lines are not the same, are they?

180 A. The diorite division he speaks of is a great fold of rock four or five hundred feet thick, which lies considerably north of the section line.

Q. Instead of making your contract with a view of that ledge of rock, you made it with a view of the section line as the division between your properties?

A. O, no; we didn't consider it as a division between the properties at all; that was simply a circumstance which affected the water question, the fact that that diorite division rock kept the water in on the south side, kept it there.

Q. In making the contract, what you intended to provide for was, the protection of your property south of the section line?

A. Protection?

Q. Yes, and accommodation of your workings in your property which lay south of the section line?

A. Protection for what; I don't understand.

Q. Protection from water; you wanted to get rid of the water that interfered with your workings south of the section line?

A. We couldn't get rid of any water unless we took it away ourselves. The very point was that diorite would prevent the water from draining out of our fold into that north fold.

Q. Yes, but in negotiating the contract, the end which you sought was to care for your property south of the section line, was it not?

A. Why, it was to prevent our paying for the pumping of water which would not do us any good.

Q. To express it in another way, you didn't at that time understand that you were interested in any property (ore) which might be found to exist north of that section line?

A. No, we didn't at that time understand that we were interested in anything north of that line.

Q. And you contracted with reference to that fact?

181 A. Yes; well, that fact didn't govern it; that fact wasn't thought of at that time, and cut no figure.

Q. What wasn't thought of?

A. The fact that we didn't own anything north of that section line; it had nothing to do with it.

Q. If your mining rights extended as you now claim them, north of the north line of section 15, you would be interested in keeping the body of the lake pumped out, would you not?

A. No, sir.

Q. Not now?

A. No, sir. The thing is just as true today as it ever was; my position would be tust the same, certainly.

Q. You mean the main body of the lake?

A. Yes; the main body where the pumping station is, where the permanent drainage is affected.

Q. North of the diorite?

A. North of the diorite; it is just as true today as it ever was.

Q. If your premises extended to the entire territory within that dotted line, would you not be interested in the water which would be gathered here in the center of the lake?

A. There is where that diorite comes down, right through there (indicating); so far as we know, and have every reason to believe, that diorite lies like that, forms one corrugation——

Mr. CLARK: You mean east and west?

A. Yes; there is one corrugation like that, and then this diorite folds up and comes right to the surface and then it makes a heavy corrugation away off there like that; that heavy corrugation is right over here where these large bodies of ore are, right here, north, you see, of that dotted line, ore body; this is all rock; there is a heavy body of rock comes right through here.

Q. South of the diorite?

A. Here is a fold here, yes, sir, what we have always claimed and what we claim now; now this body lies enclosed in the cor-

182 rugation or fold of rock; this is impervious so it won't let the water through at all; if we were to agree to pump there, and pump all this body out here, you can see it wouldn't help us a bit, because this ore would not go through there.

Mr. HANCHETT: The long and short of this whole explanation is this: If the ore body extends north of the section line, your pumping off the body south of the section line would relieve the whole body of ore?

A. If we were pumping here it would relieve it, yes, sir; it would take the water off the part of the lake that lies south of the section line; it would also take it off that part of the lake extending to the north boundary of that ore body, if it were open there, or if we were deeper than they.

Q. It would take off the surface so far as it interferes with the work?

A. It does not; there is no chance for water to lie there anyway.

Q. It slopes from the south line to the north, does it?

A. Yes, very gently.

Q. You drew the contract with reference to the south line of section 10, in reference to your property rights, did you not?

A. Yes.

Q. Then you were dealing with that as your boundary, were you not?

A. Yes, under that same impression, in Clute *vs.* Fisher.

Q. This contract states: "Which said flume said third party agrees to maintain and keep in repair and successful operation, diverting said drainage from the south side of said lake until the iron ore to which said third party is entitled, lying on, in, or under that portion of the bed of said lake lying south of said south line of said section, is mined and exhausted, and then to turn over said flume in good repair to said first and second parties hereto," etc.

183 Now, under that clause you understood that when you had mined out your ore lying south of the south line of section 10, you would have nothing more to do with draining the lake?

A. That was the idea under which we were working.

Q. Then you made it with reference to your territorial right of property being bounded on the north by that section line?

A. Yes.

Q. Now at that time you had ascertained that the ore body probably extended to the north of that line, had you not?

A. I don't think so. What is the date of the contract?

Q. What time did you say you had your talk with Mr. Mills—no, you say you sent word to Mr. Mills?

A. Not about the contract; about the ore.

Q. I am asking you about sending word to Mr. Mills by Captain Walters. What date did that occur?

A. I think it was some time in 1892, when we were pretty near the line and mining west from our shaft. We began sinking it in 1890. We sank the shaft I think 135 feet, and then cross-cut about eight feet and struck ore, and I think that ore was struck in May, 1891.

Q. At that time you had found the direction in which the body of ore run, had you not?

A. Oh, well, it took quite a while to determine that; that was when we first struck the ore. We found the direction in which the ore run about a year after; I should think 1892, along in the summer of 1892. We must have been pretty near the Cleveland, that north line of section 15. When we struck the body of ore in 1891, we cross-cut and went through it. I cannot say when we got through it. It is about 28 feet thick, and it would have taken perhaps six weeks to cut through it; and then we put a drill-

184 hole right south, and we recognized that it was a fold, the other side of it would be in the south, and we put a drill-hole across. You would have to see something of its course in order to tell its direction.

Q. How far were you then from the section line?

A. About where we struck that ore, about 100 feet; I think the cross-cut was 80 feet and the shaft was sunk within a few feet of the section line to start with.

Q. You had just as much reason then to suppose that the ore body extended in the direction of the section line as in the opposite direction, did you not?

A. Yes, of course. We couldn't tell until we had drifted on it, until we had gone some distance on the length of the deposit.

Q. From that time forward what knowledge did you have of what direction this ore body extended in?

A. As soon as we began to drift east and west on the course of the formation then that gave us the direction of it, and we did that——

Q. When did you do that?

A. We proceeded right along, as soon as the ore began to open up on it. That was in the summer of 1892; we were drifting up pretty near the north line on the west, from the time we struck the ore body in 1891 until we had drifted up to the line, we were drifting headings, taking out ore and making this drift. Immediately after coming in contact with this ore body in the summer of 1891, we proceeded to drive in each direction, and then we put this cross-cut across to the south fold. I don't remember how soon we began to drive drifts westward. I think we began to drive very soon afterwards. The first work we did after striking ore was not to drive drifts northwest; the first we did was to put a drill-hole across this fold, and then as I remember we started this cross-cut, and at
185 the same time we started to drive in this ore, drive some headings in ore to the northwest on the course. The first work we did for the purpose of ascertaining what the body of ore was, was to drive toward the northwest, or towards the lake; that was the first thing which began to define the basin; and we had as much reason to suppose the ore body extended in that direction as we did that it extended in any direction. This was during the summer of 1891 that we struck the ore in the first place. In the fall of 1891, we were commencing to drive west, and probably cross-cut it by May, driving towards the lake. I cannot say where we were the first of January, 1892. I can tell by consulting our books when it was. I think we had been driving towards the lake January 1st, 1892. I can find out by examining the books, and will do so. I have examined this map partly. Our company did not contemplate the building of a cofferdam, not along on the section line, but about there or immediately south of it. I had the same thing in view at one time, entirely across the southeast arm of the lake, so that we might remove the water from this arm and prevent the water from the body of the lake coming into that territory. We would probably have done that, if the pumping contract had not been made. There are two witnesses in court who can give you what you ask for from the books, the superintendent and underground captain of the Lake Angeline; so I did not send for the books.

Cross-examination by Mr. HOYT:

Q. This pumping contract that has been referred to related to the surface drainage of Lake Angeline, didn't it?

A. Yes. The underground drainage was not contemplated at that time.

186 Q. Now, assuming, for the sake of argument, that Mr. Clark's point as the equitable point in the center of the lake was correct, so the complainant would get what it claimed, and you were removing that water lying north of the south line of section 10 and within the dotted lines as shown on Exhibit F, would not the permanent drainage of Lake Angeline be important to you?

A. No, sir; that is the point that I was saying a little while ago——

Q. If it were permanently drained?

A. No, I don't know as it would make any difference in that body of ore at all south of that body of diorite.

Q. As you were working in there, would there not be cracks in the surface or something to let the water in?

A. I didn't fully comprehend your question at first; you mean off the surface?

Q. I mean this: If you were operating within these dotted lines, it would be important for you to have the water out of Lake Angeline?

A. Yes, it would.

Q. I mean on the claim you have made in regard to that formation of diorite, it wouldn't remove the difficulty at all, so far as the surface drainage of Lake Angeline is concerned?

A. No, not if you consider simply the surface drainage.

Q. So it would be necessary for anybody working in Lake Angeline, in that locality, to have the lake permanently drained, of course, in successful mining?

A. Yes; the lake would have to be permanently drained.

Q. Isn't it true that your proportion of the expense for carrying out the pumping contract, so called, was determined largely by the fact that you were only working south of the south line of section 10?

A. No; it was by the fact that our ore was in this higher fold.

187 Q. You remember in this conversation with Captain Mills stating that 11 feet was the lowest depth covering any working of yours, and therefore you were not interested in a permanent drainage of the lake?

A. I don't remember making that statement.

Q. You don't remember saying something like that?

A. No, I don't.

Q. Will you say you didn't?

A. No, I can't say I did not.

Q. Aren't you willing to admit, in looking simply at the pumping contract which related simply to the surface drainage, that you were claiming that you should not be charged as much in proportion as the others, for the reason that your workings lay south of the south line of section 10? Just answer the question; isn't that true?

A. No, sir. After the water is taken out of that lake, and you are mining in the two parts of lake, on the north side and south side with that division of rock between the two lines, the condition of

the things which obtains now, the taking of the water out of that north basin does not help that south basin at all.

Q. You are talking about underground drainage and I am talking about surface drainage.

A. You have got to consider the lake as it is with the water out.

Q. If the lake is not kept permanently drained, it will soon fill up again?

A. If these mines are not worked and these mines are not pumped it will.

Q. If you were operating as the Cleveland was operating, within these dotted lines, you would have to do the same thing, wouldn't you, on the north side?

A. Yes, sir.

Q. It wasn't at all necessary for you to do it as long as you were mining south of the south line of section 10, isn't that so? Haven't you protected yourself abundantly by your flume as long as
188 your works are *are* all south of the south line of section 10; is that right?

A. Yes.

Q. Wasn't that one of the inducements that led you to insist that your proportion of the pumping contract should not be so large, the fact that you were not claiming the part north of the south line of section 10?

A. Not that as much as the fact that we were not operating north of that diorite dyke, that diorite uplift.

Q. Do you remember in 1880 or 1881 having a conversation with Mr. Morse, and with Mr. Bacon, then captain of the Cleveland mine, in regard to the south line of section 10 being the boundary between your two properties?

A. I remember Mr. Morse coming to me and asking me——

Q. Was Mr. Bacon with him?

A. I don't remember; I remember Mr. Morse coming to me and asking me to sign a paper of some kind, a letter of recommendation to our people that they should sign a quitclaim deed of everything north of the south line of 10, and stating at the same time that the Lake Superior and the Cleveland were to exchange deeds of that sort, and that they would also deed to the Lake Angeline everything south of the south line of 10.

Q. I am not talking about 15; I am asking you about the conversation you had with Mr. Bacon and Mr. Morse in 1880, or 1881. Do you remember any such?

A. No, I don't.

Q. In which you referred to the south line of section 10 as the boundary line?

A. I don't at all remember anything of that kind.

Q. You remember Mr. Bacon and Mr. Morse coming over there, and your mentioning that there was a center post there right at the end of lot 6, so called, dividing lot 6 into two portions, a
189 quarter post, and stating to Mr. Morse and Mr. Bacon that the Cleveland Iron Mining Company owned a little portion of that lot lying to the east of that quarter post, and also stating

that the section line, the south line of the section was the boundary between the properties of the Cleveland Iron Mining Company and the Lake Superior and the Lake Angeline?

A. I have no recollection of any such thing at all.

Q. Do you say positively that no such conversation occurred?

A. I should say so, most certainly; I have not the slightest recollection, and I think I should have, because that is not the position I took at that time.

Q. Do you remember any conversation you had with Mr. Morse and Mr. Bacon on that subject?

A. I only remember that application of Mr. Morse, made to me, and I remember my answer very distinctly, when he asked me to recommend to our company that they sign a quitclaim deed of everything north of the line.

Q. You didn't want to do it?

A. I told him I wouldn't think of doing such a thing.

Q. When was that?

A. I couldn't tell you; I should say it was about 15 or 16 years ago.

Q. Was it prior to the year 1880; at the time Mr. Morse was agent?

A. Mr. Morse was agent of the Cleveland Iron Mining Company.

Q. Was anybody present at the interview?

A. I don't remember that there was at all; I know what my mental attitude was at that time on the subject; I know I thought decidedly that we owned to the center of the lake; I always thought so until this matter of Clute *vs.* Fisher came up.

Q. Did you make any claim of that kind?

A. I told Mr. Morse so; we had no object—we occupied the
190 territory with buildings; we dumped over there, and used it right along as if it were ours.

Q. You didn't occupy any territory west of the center line of section 10?

A. No, we had no occasion to.

Q. You say you found out in regard to this decision of Clute *vs.* Fisher in the fall of 1895; you located, I think, some time in December?

A. Yes; you mean the other one?

Q. I mean the Ice Company case against Ice Company.

A. Yes, sir.

Q. You put it December 30th?

A. Yes, sir; about that.

I got my opinion from Mr. Clark February 8th, 1896; and I knew then that the Cleveland was working right up there close to the line all the time; I knew that there had been admitted trespass subsequent to that time, subsequent to February, 1896.

Q. You made no claim on the Cleveland, you say, until October, 1896?

A. I put it in the hands of our company.

Q. You made no claim, did you?

A. No; I reported the thing as soon as I heard of this matter; I

went to Mr. Clark, and as soon as I got his opinion I sent it to our people.

Q. You were aware from February 8th, down to October 29th, of the operations of the Cleveland there north of the south line of section 10?

A. I was.

Q. When was it that Mr. Bacon first sunk his drill-hole under the bed of Lake Angeline, do you remember the time?

A. No, I do not; I am not all clear; I don't remember distinctly about that.

Q. In June, 1896, you had a conversation with Mr. Jopling, didn't you, about getting a lease from the Cleveland Iron Mining Company for a right of way for a railroad over the bed of the lake?

191 A. Yes, there was some conversation about a piece of territory they wanted; the Cleveland Iron Mining Company wanted to get from the Lake Angeline, for the purpose of sinking a shaft over on the Salisbury hill, and in connection with that was to be an exchange of ground where we had some houses which they wanted to move; they were to give us a place to put those houses on; in connection with that—we wanted to occupy some land belonging to the Cleveland Company which lies east of this land we claim entirely; it is high land, never was in the bed of the lake at all; it lies to the east of that dotted line.

Q. Did you tell Mr. Jopling the right of way you wanted lay east of the land you claim now?

A. I am now talking about stock-pile ground; I went over there with Mr. Jopling, and picked out that place, and he said he could doubtless have it.

Q. Where did that stock-pile ground lie?

A. It was up on this high land; you see the shaft there. We expected to locate our shaft almost directly across over there, and use this ground here, the high ground north of the —. There is also a piece of railroad track going over that same territory; we had already located a railroad there, and I talked with him about getting from the Cleveland Company an easement for the use of the railroad as it was then located, and just where that railroad would go with regard to this claim of ours I didn't at that time know, I did not say anything to him about it. I knew it was located. My talk with him was simply to the effect that we wanted an easement from the Cleveland Company to use that railroad as it was located.

Q. I will ask you to look at that map and state if you know what it is (map shown being Exhibit 30).

192 A. I should say it was the line of that track. I don't know whether it is the map made by our engineer by my direction. I asked him to make a survey of this ground around here, that stock-pile ground, and I think it is probable that I asked him to make that also. I don't remember asking the Cleveland Iron Mining Company some time in January, 1894, for a ease for the stock-pile ground north of the section line; I do not now remember it.

(Letter shown witness.)

Q. Is that your letter dated January 22nd, 1894 (Def't Ex. 16)?

A. Yes, that recalls it to my mind.

Q. Let me ask you if you remember that letter, dated April 6, 1894, in which it was put into the shape of a lease, and acknowledged the receipt of—between you and Mr. Mills?

A. No, I have forgotten the whole thing.

Q. You remember it now; that is your letter?

A. Oh, yes, that is true; I unquestionably asked for a lease; I had forgotten that it was put in that shape.

Q. Do you remember this other letter of April 6, 1894 (Def't Ex. 18)?

A. That is the same date you asked me just now?

Q. Yes, but it is not the same letter.

A. Well, I don't remember that.

Q. You remember them now; you remember of having received as stated in these letters, triplicate originals of the lease for stock-pile grounds, executed by the Cleveland Iron Mining Co., which you agreed to have executed by your officers, and returned them to the Cleveland Iron Mining Co.?

A. Yes. Those leases are here.

Q. And yet you didn't remember them?

A. I was perfectly astonished when I found those, which are unexecuted copies.

Q. Why did you express astonishment?

193 A. You asked me if I remembered making them; I didn't remember it at all.

Q. Where are they now?

A. Mr. Clark has them.

Q. We would like to see them.

A. I have no recollection of those leases; no recollection of their coming to me or asking for them.

Q. You remember this lease? I will have them identified.

A. There are two sets, one for some land over at the Salisbury.

(Three papers marked for identification.)

Q. I will just have you identify these leases; we will probably want to introduce them in evidence, Mr. Kidder; that is one of the leases?

A. Yes, sir; a lease of some lots. I don't think it is referred to in any of these letters; that is two or three lots over at the Salisbury; it is not a lease of the mining ground. This is a lease referred to in the letter, that is another thing. I don't think that is referred to in any of these letters. This is a lease from the Cleveland to us of some land (showing witness paper) (Comp't Ex. K). This is undoubtedly a lease mentioned in the letter. I want to say that I never knew of the existence of those until you called for them the other day in your memorandum. I remembered about them then; but I thought you asked me if I remembered at the time they were executed.

Q. No; I asked you whether or not there had been some correspondence in regard to these leases; you seemed not to remember it

until your recollection was refreshed. However, we will let that go by. Do you identify that correspondence in regard to the trespass?

(Letter shown witness) (Def't Exs. 13 and 14.)

A. That must be the one; yes, sir.

Q. That refers to the admitted trespass on your part over the section line?

194 A. It refers to our going over the line and mining out some ore. I identify that as having been furnished by the Cleveland Co. to us (Paper marked for identification.) I remember receiving a letter from Mr. Mills on or about Jan. 30th, 1896, containing two maps which showed the trespass which the Cleveland Iron Mining Co. had made over our line. (Copy of letter shown witness, . Def't Ex. 20.)

(Here follows blue-print copy of letter marked p. 195.)

196 We received this letter, I think it was the latter part of 1895. I did not make any answer to the letter; we went to the place together underground, to look the ground over. As I remember we went underground late in 1895, in the latter part of 1895; I couldn't say whether it was before or after receiving the map. As I remember it, Mr. Mills came to the office and told us about this, and I made an appointment to go down with him the next day; and whether the thing was put in the shape of a letter afterwards, or not, I don't know; I think probably it was. It wouldn't be apt to be so. I don't think I have any answer to this letter to Mr. Mills.

Q. Wouldn't it be surprising, after Mr. Mills had informed you verbally of the trespass, that he would write and inform you again by beginning to say, "We are sorry to say that our company has trespassed on your company at your east end mine"?

A. Yes; it would be. The natural inference would be that after I received the letter and the map from Mr. Mills, which does not refer to a previous verbal conversation, that Mr. Mills and I went down into the mine and looked at that trespass. A subsequent verbal conversation might account for my not replying to the letter.

Mr. HOYT: We will identify that.

(Paper marked for identification.)

197 Redirect examination by Mr. CLARK:

Q. I show you a letter dated March 26th, 1894, signed F. P. Mills, agent, addressed to A. Kidder, agent, etc., and ask you if you received that letter from Mr. Mills?

A. Yes.

Q. And was this a copy of a proposed lease here, signed by William G. Mather, the one that was enclosed in that letter?

A. This letter was enclosed with those, the three of them, and is a form here for signature by the Pittsburgh & Lake Angeline Company by the president, but not signed.

Q. Then this is simply the proposed lease that they sent to you, asking to have executed by the president of your company, is it?
A. Yes, sir; which was never executed.

Mr. CLARK: We offer this in evidence, and offer in evidence the letter and the proposed lease referred to, as the next exhibits.
Papers marked Exhibit J and K, and are as follows:

EXHIBIT J.

Cleveland Iron Mining Co.

ISHPEMING, MICHIGAN, *March* 26, 1894.

A. Kidder, Esq., agent P. & L. A. I. Co., Marquette, Mich.

DEAR SIR: Herewith please find leases in triplicate of some land used by you at your east end mine for stock-pile purposes.

We have changed the time as you wished but to fully pro-
198 tect us we have had provision made so that if we should pull in any of this ground that we own, but give you the use of free, we are not to be held for it in any way. This seems reasonable to us and proper.

We have started a drift towards your mine, but have 650 feet to drive, and it will take us about a year to get there.

Yours truly, F. P. MILLS, *Agent.*

P. S.—After the execution of these leases please send one copy to Mr. W. G. Mather, pres., Cleveland, Ohio, one copy to us here and retain the remaining one.

"F. P. M."

EXHIBIT K.

It is hereby agreed between the Cleveland Iron Mining Company, a corporation, party of the first part, and the Pittsburgh & Lake Angeline Iron Company a corporation party of the second part, both of Ishpeming, Michigan, as follows:

In consideration of one dollar by the second party paid to the first party, receipt whereof is hereby acknowledged, the first party does hereby let and license to the second party on the terms and conditions hereinafter mentioned, the surface of that part of the south half of the southeast quarter of section ten in township forty-seven north, range twenty seven west, Marquette county, Michigan, lying south of Lake Angeline for the use by the second party for stock-pile grounds and for temporary structures used for mining purposes, but not for any permanent buildings such as engine-
houses, and for no other purpose whatever.
199 This license shall continue at the will of the first party, and shall be determinable by written notice to be served upon the mine agent or superintendent in charge of the mine of the second party at Ishpeming, and such notice, if served between the first days of November and April, shall be for a period of one year and require the surrender and possession of said premises to the first

party at the end of one year from the date of service thereof, and if said notice be served between the first days of April and November, the same shall be for a period of six months and require the surrender by second party of the possession of said premises to first party at the end of such period of six months. Second party may remove all its buildings within the time given in said notice.

The second party, in consideration of the foregoing, agrees to occupy the surface of said premises for no other purpose than as aforesaid, and covenants and agrees that on receipt of the notice hereinbefore mentioned it will remove all stock piles of ore placed by it on said premises and any and all structures built and used in connection therewith within the period provided for in said notice, in accordance with the foregoing terms, and will well and truly surrender the possession of said premises to the first party at the end of the period provided for in said notice.

It is mutually understood that second party is now conducting its mining operations underground from its mine at Lake Angeline in the direction of the parcel above described and the south boundary thereof, and that ore belonging to the first party is believed to exist under the surface of said land and eventually will be mined by the first party when reached as aforesaid, and that if in conducting such mining operations the surface of said ground
200 shall be let down or caved, the first party shall not be held responsible for any loss or damage that may be occasioned to second party thereby, the second party agreeing to take all risks arising from such mining operations of the first party, in consideration of the accommodation received by second party in and by the terms of this instrument.

In witness whereof, the parties hereto have caused these presents to be signed by their presidents respectively, and the corporate seal of each to be hereto affixed, this 21st day of March, A. D. 1894.

CLEVELAND IRON MINING COMPANY,
By WM. G. MATHER, *President.*
PITTSBURGH & LAKE ANGELINE IRON COMPANY,
By —— ——, *President.*

Q. In regard to this railroad they have mentioned, before you found out this decision of Ice Co. *vs.* Ice Co., 102 Mich., referred to, was that railroad laid out and the construction of it commenced, or finished?

A. It was finished—that road was built during the winter of 1895 and 1896.

Q. Then it was before your knowledge of the decision in Ice Co. *vs.* Ice Co.?

A. I knew of that decision in February, 1896—or the latter part of December, 1895.

Q. Something has been said about there being negotiations with regard to a proposed lease of that railroad; was anything of
201 that kind ever carried out or executed?

A. No; never any such thing was ever drawn; no such in-

strument was ever drawn. Our company is a corporation under the general mining law of Michigan. I went down into the mine with Mr. Mills at the time spoken of by Mr. Hoyt in January, 1896. My impression is it was late in the fall of 1895, but that letter of Mr. Mills would indicate that it must have been in January, 1896, immediately after that letter was received. I made the proposition that we should go down together. I do not know how long we remained there. We were in the mine an hour or two, perhaps. I went from our mine over into the workings on the north side, north of the south line of 10; did not go through the workings. We passed from one mine into the other. It was one deposit, one ore body and apparently similar ore in the two. I don't remember whether this was the first talk I had with Mr. Mills in regard to that ore body north of the south line of 10; I don't remember.

Mr. HOYT: Before you built that railroad over the bed of Lake Angeline you got verbal permission from the Cleveland Iron Mining Company to do so, didn't you?

A. Yes.

Q. Who did you have your conversation with in regard to it—Mr. Mills?

A. I think it was with Mr. Mills. I do not remember the date of that conversation. We located two different railroad lines north of the south line of section 10 at different times and got permission both times.

Q. So that before you began building your railroad you had the permission of the Cleveland Iron Mining Company, and the understanding was that as soon as you definitely located your railroad your easement would ripen into an agreement; wasn't that so?

202 A. I don't really remember as to that. I don't remember that in our conversation any reference was made to a lease to be executed at all. I don't think at that time anything was said in the correspondence about that. I don't remember that we did subsequently. I had a talk with Mr. Jopling about the location of a railroad at the time we were to give them a lease for this land over there for their shops. I don't think I talked with him as late as September, 1896, about this matter. I don't think we had any talk with him after early in the summer, in June, 1896; I know that I did not. I am confident that I did not have conversation with him as to this matter as late as September, 1896. I don't think it is possible I could have done it. The railroad was completed some time in May, 1896. It was begun in the fall of 1895.

THOMAS WALTERS, sworn as a witness on the part of the complainant, testified as follows:

Direct examination by Mr. CLARK:

I am superintendent of the Pittsburgh & Lake Angeline Iron Company. Reside at Ishpeming. Have been in the employ of that company fourteen years the first of August of this year. I started as mining captain. I was made superintendent about eleven years ago, superintendent of the mining work of the company at

the mine. My duty as superintendent was to lay out the mining work generally in the mine, and upon the surface, under
203 the general supervision of Mr. Kidder. When I went there, they were working the old open pit from the surface, and they were taking the waste from this open pit and putting it into the bed of the lake. In that way they made, from observation, I should say, about five acres of ground north of the south line of section 10. Upon this made ground north of the south line of section 10, the first building placed there was moved over. The first building erected was a carpenter shop on the line between sections 10 and 15, and the first building erected north of the section line was a small powder-house that still remains in the same place. That was erected in the spring of 1884. This powder-house was a magazine for taking care of the powder, storing explosives that we used in the mine. It has remained there ever since. The carpenter shop I spoke of was built in the spring of 1884, about one-fifth of it was on section 10, and the balance on section 15. That was built in 1884. The machine shop was constructed in 1885. That was built entirely upon section 10. The carpenter shop remained as first located about three years, and the machine shop about two, when they were moved onto section 15, just over the line. We moved over on section 10 three other buildings, besides the magazine, carpenter shop and machine shop. The first was a blacksmith shop; next was an ice-house, and the next a house formerly used as a pump-house, now used as a warehouse. These last-named buildings are still on that territory, and in possession of the complainant.

Our company began sinking a shaft in the east end mine in 1890. I have seen the map that you are looking at. I suppose the shaft as located near the 16th post on the south line of 10 is accurately located on the map, as it was done by our engineer, and his
204 work is accurate. It is about that location. The shaft was started in 1890, and was completed down to the first level, the first ore where we drifted, about the first of March, 1891. Before sinking the shaft we did diamond drilling. Near that territory the drilling was done southwest of the shaft; the nearest about 250 or 300 feet from the shaft. We reached the ore formation in the drilling, that is, silicious ore.

Q. Does the finding of silicious ore indicate that good ore may be near by?

A. It depends entirely in what community you find it. From the drillings we formed the idea that it was proper to sink a shaft, and we sunk the shaft and found good ore.

Q. Now, after this exploratory work, driving these drill-holes, sinking drill-holes, and driving a shaft, did you have any conversation with any of the employees of the Cleveland Iron Mining Company in regard to what you found there?

A. After we struck the ore?

Q. Yes.

A. Yes, sir. I had a conversation with Mr. Mills; I talked the matter over with him very frequently. We interchanged views very

often. He was then the agent of the Cleveland Iron Mining Company at that time.

Q. About what time did you have your first talk with him about what you had found?

A. We struck the ore in May, 1891, if I remember correctly; struck it with a cross-cut, a drift from the shaft, at the first level; and I should say from our general intercourse that I had a conversation with Mr. Mills about striking the ore at that time. I could not say positively that it was then. I remember very readily that when we drifted to the line, a few feet over the line, of telling Mr. Mills what I thought about the ore there. That would be about March or April, 1892. The substance of what I said to him
205 was that they had a mine; they had ore on their property. In saying that I referred to section 10, over the south line of section 10. I told him what indications we found of ore across the line; about three or four or five months after that he applied for the privilege of drilling from the bottom of our *work* workings across to the north over into section 10. I talked it over with Mr. Kidder, and we decided to give him permission to go there and drill. I am not positive how many holes they drilled from the bottom of our mine; but I think it was five. Occasionally I saw the course of the drill-holes that they were drilling. They found the continuation of the ore body that we had been working on. They found it as we told them we thought it would be, ore to the north.

Q. Do you know whether prior to that time he had done any drilling work, or had directed any drilling work to be done for the purpose of exploring this south half of 10 in your neighborhood, before you let him go into the mine and drill across?

A. Some years before that they drilled a hole from the old workings, I recollect that very readily; Mr. Mills and I had quite a good deal of conversation about that hole.

Q. What old workings do you mean, the Cleveland Lake workings?

A. That over north of the diorite.

Q. The dividing diorite mentioned in this case?

A. Yes, sir.

Q. Do you know what they encountered in that, whether any ore in that hole?

A. Nothing more than the conversation I had with Mr. Mills.

Q. What did he say about it?

A. In the first place he told me he was going to drill a hole, or was drilling a hole there, and we had some talk about it, and I told him I would see Mr. Kidder and see if we couldn't take up
206 the hole after they had got through with it, if he didn't strike ore; and he came to me when they got through drilling and told me they had nothing but jasper, after passing through the schist or diorite, and wanted to take up the hole; I asked him what condition the hole was in, and he told me they were afraid to put it any further; they were getting into a little trouble with the jasper; I told him to take his hole; we were not going to run the risk of losing carbons if they were afraid of it.

Q. Did he say whether they found any ore in there?

A. He said they had not any good ore.

Q. I show you on Exhibit F this line marked drill-hole, and ask you if that is the one, marked 970 feet long, through the diorite down to the south line of 10, if that is the drill-hole?

A. I should say that is about the direction he gave me to understand the hole went.

Q. What would you say it would cost per foot to put that hole in through the diorite and down to the south line of 10 as here located?

Mr. HAYDEN: On the ground that the witness could not know, without experience, we object to it as incompetent.

Q. I will ask you if you have had experience in drilling, and cost of drilling, and so on, under your supervision and management during these years you have mentioned, so you know the cost of that kind of work?

A. I should say about $3 a foot on the average.

Q. Now these holes that Captain Mills was drilling, the five over in your mine to the north, what do you say those would cost to put them in?

A. Taking into consideration that the Lake Angeline furnished the power to drill with, I would say about $1 a foot. I do not recall now how long they were. There were none of them
207 very deep. I think the outside length was 300 and some feet. I think that was the deepest hole. I couldn't recall the depth of each hole.

Q. Why do you say that $1 a foot would be a fair price when you make it $3 drilling through the diorite?

A. There is a great deal of difference in drilling in paint rock and ore than there is through jasper, and the depth of the hole makes some difference.

Q. Then these holes from the bottom of your mine were through paint rock and ore, were they?

A. Yes, sir, as far as I know: some jasper, but not a great depth.

Q. Is paint rock the associate rock of ore?

A. You find it very frequently. It is of a soft nature. I had been down the shaft of the Cleveland Iron Mining Company over to the north of the lake at the other end of the drift that was driven through the diorite. I went part way through the drift that goes through the diorite. I did not go as far as the north side of the diorite division. I have been in the workings of the Cleveland north of the south line of section 10 on the south lay of ore south of the diorite some three or four different times;-the last time in the spring of 1896.

Q. From your examination, and having been through there this three or four times, can you form an estimate of about what quantity of the better quality of ore was taken out of that mine?

A. At that time, I think I could.

Q. What would you say?

A. I should think it would be somewhere in the neighborhood of 40 to 50 thousand tons taken out at that time.

Q. At what time was that?

A. That would be about January, 1896, I think; I couldn't tell to a month, but about that time.

Mr. HOYT: Didn't you say the spring of 1896?

208 A. Yes, in the spring, I mean the early part of 1896.

Mr. CLARK: At what time, what month?

A. I think it was January, 1896; I wasn't here in March. That is the last time I was in there.

Q. How frequently were you at your own mine, the east mine there?

A. O, whenever it was necessary; sometimes go down often; and other times I didn't go down for quite a while.

Q. Did they take this ore out of this south lay of ore and take it up the shaft to the north of the lake?

A. Yes, sir.

Q. What was the quality of ore in this south mine?

A. High-grade hematite ore.

Q. What did you say it would cost to do the mining and place that ore in the cars at the mouth of the shaft?

Mr. HAYDEN: I object to that as incompetent and irrelevant.

A. I would have to state the different portions; the mining and securing the ground, the labor of securing the ground is worth about 35 cents a ton.

Q. Breaking and putting it into the skip and taking it up?

A. No, that would be simply breaking the ore and securing the ground; the timbering, from my experience, would be about 15 cents per ton, and the loading and tram-ing would be about 6 cents a ton, with the appliances they had, electric tram.

Q. Making a total of about how much?

A. That would be 56 cents a ton; then there would be some other expenses, such as the bosses, a portion of the captain's expense—I should say about 60 cents a ton would put that ore in the skip.

Q. Would it take it to the surface?

A. No.

Q. What additional expense would you say was particularly attachable to the ore per ton, with all the other expenses in the management?

209 Mr. HOYT: We continue our objection.

Q. Including taxes and everything else, what would the ore cost the company when it was ready to ship on the cars, or load?

A. That is rather a hard question to answer; it is a large organization, and I don't know how they distribute their proportional part.

Q. Can you form a judgment?

A. But under the circumstances at our own mine, I would say from $1 to $1.10.

Q. From examining the workings in the Cleveland management,

and your own, what would you say as to their relative management and convenience for cheap mining; can they mine as cheap as you can?

Mr. HOYT: The same objection.

A. I don't see why not.
Q. And the ore was just the same?
A. Just as good quality; the same thing, the same vein of ore.
Q. What was the character of the ore, the grade of it?
A. The percentage?
Q. The quality?
A. The ore we mined west of our shaft, which is a continuation, which goes over section 9 and 10, will go 67 per cent. in iron and .028 in phosphorus.
Q. Was this ore in the Cleveland mine over the line of the same quality?
A. Just as much so as the yolk of an egg is the same; you can't tell any difference in it; simply a line division there.
Q. Do you know what that kind of ore was worth in 1895 in Cleveland?

Mr. HOYT: We object to that.
Mr. HAYDEN: As irrelevant.

A. I don't know that I do; I don't feel competent to say.
Q. Do you know anything about the cost of freights and shipping, and so on?
A. I know as far as the Lake Angeline is concerned.
210 Q. Give us the expense you incurred as to the same ore, same quality of ore?
A. The way we ship most of our ore, shipping it to Marquette, is a 32-cent rate; the boat rate is about 75 cents, and that was to Lake Erie ports, Cleveland and other ports. There would be insurance of course.
Q. How much is that, and commission?
A. I couldn't say at all; I don't know how it is sold, whether it is sold on commission, or anything at all.
Q. What profit would you say, should be realized upon this ore that was being taken out by the Cleveland Iron Mining Co., from your experience and knowledge of how it should be mined and sold?

Mr. HOYT: We object to that; he has expressly stated that he didn't know.

A. I don't know the selling price.
Q. In examining these workings, what can you say as to whether they were crowding the work, or how many men they had in the mine?

Mr. HOYT: We object to that.

A. I know they were crowding at the different times I was there.
Q. About how many men were they working in that mine at that time?

A. They must have been working over 100 men at one time when I was in there. That would be along about the early part of 1896.

Q. With 100 men in that kind of ore in your experience as to what can be mined with that number of men, what quantity would you say they would mine in a double shift in one day?

Mr. HAYDEN: That is objected to as incompetent and also irrelevant.

A. I should say 500 tons in 24 hours. It was an ore fairly easy to mine. I understand that this mining work has been pros-
211 ecuted with some vigor since the time they opened it up. I understand this from my own observation.

Q. Now, this railroad that has been spoken of as marked on this map Exhibit F, I ask you whether the Cleveland Iron Mining Company was receiving any benefit from that road itself?

A. Yes, sir; they used it to ship several thousand tons of ore. They are using it constantly to ship in coal for the scow, and also timber and lagging for operating the mine on that side, or a portion of it. I have heard the testimony of Mr. Kidder and Mr. Bradt with regard to this flume that was put in. I couldn't say that I heard all Mr. Bradt's testimony; I heard quite a good deal of it. There is no doubt but what his statement as to the location of the flume is correct. He did the engineering on it. I didn't hear Mr. Bradt make any statement of the cost. I did not hear Mr. Kidder's statment as to the cost. The water is taken up and carried away from the east end and from the water-shed south of the lake by a flume, in the manner stated by Mr. Kidder and Mr. Bradt.

Cross-examination by Mr. HANCHETT:

Q. Mr. Walters, what was the condition of your operations in the shaft spoken as of the date say January 1, 1896?

A. I think we were sinking the shaft; I wouldn't be positive.

Q. When did you get the shaft far enough down so that you had run your drill and found the ore; I mean January 1, 1892?

A. The shaft—we were then sinking the shaft. We struck the ore in May, 1891. We began sinking the shaft in 1890. The first of January, 1892, we were sinking the shaft. We began the drift on the ore on February 8th, 1892. We ran the drift east
212 and west, both ways. We were carrying a double drift. It would go a little slower. I would say about 30 or 35 feet was driven by the first of March, 1892. That would be going a little north of west, toward the body of the lake; that is, toward the section line. We carried this drifting work right along from day to day from that time on. We had got about 65 feet driven on the 20th of March from the starting point in front of the shaft; that is, southwest of the shaft, and running thence northwest toward the section line; I don't think we reached the section line there on that drift. When we reached the section line—it was on a raise, and drifting from a raise further up, higher up, toward the surface. I am not positive to what distance we did carry the drift; I think

about 170 feet. That did not carry us across the line. We started a good bit over 100 feet from the south line. This drift, you must understand, was started from the cross-cut. It goes west, or south. The cross-cut to which I refer as marked here is cross-cut on our map F. That is the cross cut we started. We started on the first level. I could not tell you the distance along that drift from the cut to the section line. The distance would be, if I remember right, somewhere between 100 and 170 feet, but I wouldn't be positive.

Q. You were in ore the entire way from the cross-cut as you followed that direction towards the section line, were you?

A. No, sir; the formation has got a cap of jasper and it dips down west as the body of ore dips west, or northwest, and we started from the back of the shaft, with about 45 or 50 feet of ore; at the time we got in ore that rock had dropped in that shape (indicating) and cut the ore out, and left us in a bed of rock. Our drift was upon a level. It would be impossible to use the dip of the
213 drift; we had to use a pump to keep the water out. The indications were that we were over ore in our drift. We knew we were following the lead. We found it the whole distance as we went from day to day towards the section line until the cap cut us off. We were aware that the ore was underneath us. By the middle of March I should think we had got about 65 feet. It had the appearance that the ore body continued in that direction. That was my judgment at the time. We began to run the drift from the cross-cut on the 8th of February. We started at that time the running of a drift in the opposite direction from the cross-cut.

Q. By these operations, and by your cross-cut, you had gained then much information in regard to the body of ore, both as to its width and as to its direction, had you not?

A. Not so much in its width as we had possibly in direction.

Q. Had you not ascertained something of its width by your cross-cut?

A. Only in one place.

Q. That was an indication of some value?

A. Yes, sir.

Q. By your drifting you were satisfied that the body of ore extended lengthwise in that direction in which you were running your drift?

A. We had reason to suppose it was, yes, sir.

Cross-examination by Mr. HAYDEN:

I visited the underground workings in that east end mine in company with Mr. Edwin Ball. I cannot fix the date; we get a great many visitors at Ishpeming, and it is a pretty hard job without marking it down to fix such dates. We got within several feet of the section line when Mr. Ball was there. It might have
214 been 10, 12 or 15 feet off, fully 10 feet or more. Then we confronted that caved ground. That cave was in the upper level where a trespass had been committed by the Cleveland Co. over the line. I presume I called attention to the trespass; I don't recall it

now. The cave was in the second level. The trespass drift of the Lake Angeline committed in 1893 over the line was above the first level.

Q. You were, therefore, at the time you were in the mine with Mr. Ball on this occasion, further west on a horizontal line than the trespass drift of 1893?

A. We couldn't get further west, it was caved in. We were in the second level.

Q. I didn't mean further north, I mean further west than the trespass drift of 1893 in the upper level?

A. No, sir, you couldn't go there.

Q. When you and Mr. Ball went down in the mine with these other gentlemen, on the occasion in question, at the point where there was a cave-in, and beyond which toward the line you couldn't go; you *you* were then at a point further west than the location of the trespass drift of 1893?

A. I don't think we were.

Q. Was not the trespass committed by the Cleveland Co. in January, 1896, or prior to that time, in the second level?

A. It is below the second level, and at a point further west than our trespass drift on them in 1893.

Q. So that if you were opposite that trespass committed by the Cleveland Company in 1896, you were further west than the trespass drift in 1893 committed by yourselves?

A. If we could get in there, but on account of the caving, it caved back far beyond where the trespass was, 10 or 12 or 15 feet from the line south of it. Of course Mr. Bradt's maps are correct; we will take them as such.

215 Q. You say the Cleveland Company was using that railroad track across the southwest quarter of the southeast quarter of section 10, this track shown on the map?

A. Yes, sir. We got permission from the Cleveland Company to build across there. I do not know the conditions of the permission as given by the Cleveland Company to build that track. I did none of the negotiation for the track, for the right of way, and took no part in the discussion about it. Mr. Kidder did that. We are using that track now, and have been right along.

Q. And that same permission originally granted has not been rescinded, or anything of that sort, but continued right along under the first understanding you had regarding it?

A. I suppose so; we are shipping over it.

Q. You spoke of the miners working in the mine, and stated that if there were 100 miners working they could mine 500 tons of ore in each 24 hours?

A. Yes, if they were working on ore.

Q. I suppose you don't know how many miners were working on ore from time to time, from day to day?

A. I never counted them; I asked some of the men when I have been in there.

Q. You don't know anything about the prices of ore from time to time in Cleveland?

A. O, occasionally I do; I know this year.

Q. Do you know generally whether the prices of ore in 1890, 1891 and 1892 were very much higher than those in 1895, 1896 and 1897?

A. Yes, sir; I don't know about 1897—I mean to say I don't know about 1896 and 1895; and 1897 I do know they were a great deal higher. There has been mined out of that east end mine al-
216 together 850,000 tons; not all first-class ore, about 72 per cent. I should say. I can't tell exactly what portion was first-class.

Q. The maps made by your engineer of these workings that have been worked out, are not cross-sections, I understand it, but he says so; do you know anything to the contrary?

A. No, sir; I know they are not cross-section maps, certainly.

Q. Not being cross-sections, it would be impossible to tell exactly how much ore was taken out of any particular place in a drift?

A. Not at all.

Q. I show you this map of Mr. Bradt's and call your attention to the lead-pencil marks, the first one commencing at meander corner 16, and drawn at right angles as nearly as possible with the water body in front of it towards the southwest, and the other one from a point about in the center of that water body at that place northwesterly parallel about with the center of the water body, or in the center of the water body, to the section line, forming with the section line a triangle opposite to the shore front of lot 7 of the Cleveland Iron Mining Company, distinguished on the meander line by the marks north 45 degrees west, being the first course from meander corner 16; now can you tell how much ore was mined out of your east end mine within that triangle?

A. At the time we quit—I cannot tell now.

Q. Why can't you tell now?

A. Because I didn't keep track of it; our method of working, it does not make any difference what angle it is, we can tell how much ore is taken out by measuring up the drifts.

Q. You could have done it at the time if you had then been asked to do so?

A. Yes, sir.

Q. But now you can't tell?

A. Not unless the whole map was brought right up and figured up.

Q. The map not being a cross-section, can you tell?

217 A. It would be the crossing of the work, of the deposit of ore, that forms a cross-section of the vein of ore itself. The workings, where you take it out suppose you had a drift 9 feet high and 8 feet wide, and 50 feet long; you can easily figure the amount of ore in that drift.

Q. If the place is stopped up you can't measure it, can you?

A. If you get the dimensions of the drift after the ore was taken out, you can.

Q. Without a cross-section, how do you know the dimensions?

A. We certainly know the length of the drift, when we pay so much a foot for it.

Q. Do you know the length of it?

A. Yes, sir.

Q. Do you know the width of it at each lineal foot?

A. Yes, sir.

Q. How can you tell without cross-sections?

A. The width of the drift, you have given a certain-sized timber to be put in, and they have to put in that timber, and to put in that timber they have to take out so much ground.

Q. Who have to take out so much ground?

A. The miners.

Q. But is there any room on the outside each side of the timbers?

A. We take off in the first place—we put a solid drift in, if you will, or a drift into solid ground; then we take off eight or nine feet from the sides of these drifts, a given size all through the mine; the timber is a given size all through the mine; we can tell how many tons in a foot comes out of these drifts; we have got to do that to find out how to set contracts.

Q. Can you tell now?

A. Yes, sir.

Q. I want to know if you can figure it up now, how much it was?

A. No, I can't figure it up now; I thought you meant figure up a drift now, to see how much a foot it was, how much a ton.

218 Q. No, I wanted to know if you can tell how much ore was taken out?

A. No, not right here.

Q. Nobody could go in that territory?

A. No, sir, not without great expense.

Q. It is filled up with rock?

A. Yes, sir.

COURT: Have you any diagrams at home, showing what that is?

A. We have diagrams of the whole workings.

Mr. HAYDEN: Perhaps you and I don't understand. These sets are not put in the mine so as to lie on the walls, the timber sets?

A. No, sir.

Q. They are inclosed in the walls; they are not absolutely perfect in slope?

A. We drive them across from wall to wall; we do not drift with it when they are stoping ore; if you have a vein of ore 50 feet wide, we take that slice off across a 50-foot vein of ore.

Q. Will you bring here into court tomorrow, or have sent down, a diagram of the workings in this particular portion of the mine I ask you about?

A. It is a long time ago; it would take quite a while to look it up. We can give you a very fair estimate of the amount of ore taken out of there.

Q. A fair estimate?

A. Yes, after figuring of it.

Q. How long would it take you to figure?

A. Well, I would have to find out the dimensions of the whole thing; I don't know the angle you have got; I don't recall to mind.

Q. You say with electric haulage, you think it would cost about 60 cents per ton to take out ore, not including the general expenses of taxes and such things as that; did you include the expenses of electric haulage?

A. Yes, sir.

Q. Does that include the expense of the plant?

A. The percentage of wear and tear I include, the expense of operating the plant, and interest on the investment of the plant I include.

219 Q. You said in your testimony that about 40 or 50 thousand tons of ore had been taken out of some place which you visited once; I didn't understand where that place was.

A. I visited it several times. It was north of the section line, the south line of 10. It was a point east and west and north of the trespass drift of 1893. It was quite a distance. The trespass drift, as I understand, was about 1,000 tons by the figures given to us, and that was a very small portion of the amount of ground that was opened there. It was the ground opened around the vicinity of where the trespass drift was. I was there in January, 1896, I should say. To the best of my knowledge, there were five drill-holes down in the mine, drilled from our first level by the Cleveland Iron Mining Company, and I know they drilled some on the surface; but how many I couldn't say, whether it was one or ten. I know they drilled some there.

Q. I want to ask you if you know how deep the ore body is below this second level south of that section line?

A. At what point?

Q. Well, on the section line?

A. Well, but I must know something about east or west; you know it is a very flat trend to the northwest. I can tell you where we discovered the ore. From the third level there is only a few feet at the right under the place where we discovered the ore; you go five or six hundred feet, or four or five hundred feet, further west and it goes down there quite a little deeper.

Q. Suppose you take a point on the west limit of the vein where it intersects the section line in a northwesterly course.

A. I don't think it would be very deep there, because the diorite bluff with the schist on it follows it down close to the section line, where we intersect the section line furtherest west. It is not
220 deeper on the eastern limit of the vein. The south side is the foot wall. The ore body has a trend to the northwest. We have not mined out all the ore to the southeast under the southeast arm of the lake bed.

Q. If you can't go over the section line for any more ore, is not your east end mine short-lived?

A. Well, it depends entirely on the amount of ore you are going to take out, remove in every year; there is a good deal of ore there. There is a great deal more ore developed there than there is on the north side of the line. Whether there is as much in prospect is a

thing that is impossible to tell without further development. If I am to answer that by my own ideas about it, if the fold turns out as we first thought it would, we have got more ore on the south of the line than there is on the north of the line. I have not seen anything to change my opinion yet.

Q. Did you not a short time since, within the last month, in a conversation with Mr. Jopling, say to him you thought your east end mine was short lived if you couldn't go beyond the section line?

A. I don't recollect that I did; it depends on what he terms short-lived; no one has any business to say but what the lake shaft is good for 10 years' steady working. We are taking out about 20,000 tons a month from that part of the mine, from that same vein. (Showing witness a letter dated March 2nd, 1892 (Def't Exhibit 3), he states:) I signed it without doubt. I don't remember the letter. Yes, that is my letter; I signed it.

(Letter marked for identification.)

(Showing a further letter to witness.) That is not my signature; I do not remember anything about that letter.

Q. Would you say whether or not it accompanied this draft
221 which I have just shown you, to which is attached your own signature, the same date, March 2, 1892?

A. I have not much doubt but what it is all right, but I don't remember it at all, and that is not my signature. I think it is Mr. Cruse, a clerk in the office. No, that is not his writing; I don't believe. That is his writing here; I think it is the same writing. This short letter is Mr. Cruse's writing, a clerk in our office. He would not write that without my direction, I presume.

(Paper marked for identification Def't Exhibit 2.)

I could not swear to James Laughlin's signature, not if I saw it. All the correspondence by Mr. Laughlin is with Mr. Kidder, not with me.

Q. Do you remember Mr. Jopling being in the office of the Lake Angeline Company about the month of September, 1896, and talking with Mr. Kidder there about a lease of the railroad track?

A. Mr. Jopling has been there more than a hundred times; it would be impossible for me to recollect any particular date without some grounds why I should recollect it.

Q. Do you recollect his being there in the month of September and talking with Mr. Kidder about this railroad track?

A. I do not, sir; I recollect Mr. Jopling being there a good many times. I should think this first railroad track was built over north of the line that went down from the east end mine about 1889, that is the track now removed.

Q. Did you get permission from the Cleveland Company to build that over on the north side of the line?

A. Why, we have interchanged things of that sort without much permission; if there was any contracts or anything of that sort to be made, I had nothing to do with it; Mr. Kidder did that busi-

ness. I don't know of any particular contract or any contract with regard to the railroad track.

222 Q. Did you yourself and Mr. Kidder have a conference with Mr. Jopling in the month of September, 1896, in which you made a complaint that the Cleveland Company were working on your line, or that section line in such a way that they were liable to cave your ground again?

A. No, sir. I do not remember of having a conversation relative to such a subject-matter in September, 1896, or in August of that year. I do not remember of Mr. Kidder's making complaint to Mr. Mather, the president of the Cleveland Iron Mining Company, relative to the work they were carrying on on their side of the line; no such conversation took place with me. I have never known how close they have been to the line since I have been in the mine myself, since January, 1896, so I couldn't say so.

Mr. CLARK: I ask you what you have to say as to the testimony of this witness Edwin Ball, with regard to your showing him the line in this east mine?

A. I want to say that on account of the cave that occurred from the Cleveland side, we couldn't get anywhere near the line, that I could say, "Here is the line."

Q. Then you say that you didn't say it?

A. I wouldn't say—I might have said we were cut off here by a line; I couldn't say, "Here is the line;" we couldn't begin to reach the line.

Q. Because the cave prevented?

A. Yes, sir.

JAMES READ, sworn on the part of the complainant, testified as follows:

Direct examination by Mr. CLARK:

I reside in Ishpeming; am in the mining business. Have
223 been engaged in that business 35 or 36 years; and in the iron mines of Marquette county about 21 years. I worked in nearly all the mines in Ishpeming. I had charge of the mine of the Cleveland Iron Mining Company north of the Lake Angeline; I was captain of that work. I took charge of the work in that shaft in 1887, and I left there in December, 1894. I think the drift driven through the diorite that separates the north ore body from the south ore body was driven something over 600 feet when I left.

Q. Do you know what was the cost of driving that drift per foot in the diorite?

Mr. HOYT: Let us have our objection to that, as incompetent and immaterial.

A. Something like $8 a foot.

Part of it was done by contract and part of it on company account. I think it was something like $8 it cost up to my time, while I was there, for the 600 feet. That is the price we paid on the

contract, and we run part of it on company account, but we figured on the work that other men did. I don't remember exactly the amount that we drifted on contract at $8 a foot. Really it was called the contract all the way through, but there was no different price made in the contract. $8 a foot was the contract price. We considered at the time that $8 was a fair price for that work. After driving through the diorite into the ore beyond the diorite, I would say that the ore taken out of the drift would pay for driving the drift, or more than pay for itself, I think. There were no other expenses in driving the drift, except the contract price of $8 that I have spoken of, to my knowledge. The power for driving the drift was taken from the old mine. It was compressed air.

Q. Did this $8 cover everything except the compressed air furnished by the company?

224 A. Well, there is of course my salary, a portion, and a portion of the salary of the agent.

Q. How much would you add to the $8 per foot, those expenses?

Mr. HOYT: The same objection is continued.

A. Well, it would be so small I could hardly tell. It would be less than $1 a foot.

I don't remember what year that drift was driven through the diorite, that is, just when it started. I left there the 15th of December, 1894, and at that time the drift had been driven 600 feet I think; I could not say exactly. I have never been in through the mine, and through the diorite drift into the south body of ore since it was driven completely through. Since I left that mine I was working at the Winthrop for a while, and working for the Lake Superior Company a while, and I am now working for the Lake Angeline Company. I have been in what is known as the east end mine of the Lake Angeline; I am working there now; I only just started. I have been working on the surface. I have not been through the east mine over into the Cleveland workings just across the south line in through that drift.

Q. Do you know anything about the drill-holes put in——

A. Just wait a minute; you want to know if I had ever been across the line?

Q. In the ore where they are working?

A. During my visits there, O, yes.

Q. When was that?

A. I don't just remember the date; I have been three or four times; I was down once with Mr. Mills and Mr. Bradt and Captain Walters and Captain Tregambo. I think that was the last time I was down there. It must have been somewhere around 1892; I can't tell exactly, but I think it was 1892. We were under

225 what they call the line between the Lake Angeline and the Cleveland. I was there with these gentlemen to examine the mine; we frequently go to each other's mines. I couldn't be positive of the year; I think it was 1892. I was then at the Cleveland. It was before we started the diorite drift, I think.

Q. Was the Cleveland Iron Mining Co. doing any mining on the

south formation of ore before they got the diorite drift driven through?

A. We started mining on the north formation.

Q. You are talking about the north formation of the Cleveland mine?

A. No, sir; I am talking about the south formation of the Lake Angeline mine.

Q. You misunderstood the inquiry. I was speaking of the workings of the Cleveland Iron Mining Co. just north of the south line of 10 over beyond the Pittsburgh & Lake Angeline; have you ever been over there?

A. Yes, sir; I was through there at one time.

Q. Just to this line?

A. To just the line that Mr. Mills—we couldn't go through the drift because it wasn't there; we went down through the Lake Angeline shaft.

Q. Did you hear Captain Walters' testimony?

A. Yes.

Q. Was that the time he pointed out to Mr. Mills, as he states. What were you down there for; did you hear any talk between Mr. Walters and Mr. Mills?

A. Well, they were talking about the formation, and about the ore, and went in to see the line. I couldn't just remember anything particular that was said at that time.

Q. What did you discover as to the formation in 1892, as to the probability of the ore pitching north of the south line of 10?

A. At the time of our visit, they were on what they call
226 their first level, I think; I don't know if they had any other level at the time; I think it was the first level, and we went and examined the workings of the mine, and they had a drift driven through, what they call up against the line, of the Lake Angeline Co. and there was some ore left on the Cleveland side of the line, over the south line of section 10, called the Cleveland mine.

Q. What can you say as to whether Captain Walters pointed that out to Captain Mills?

A. Captain Mills and myself went in there, and looked it over, and Captain Mills told me that was the line, that was our line. I was then in the employ of that company. The ore at that time was a kind of blue hematite, nice-looking ore. That was before the Cleveland Iron Mining Co. put in their drill-holes from the bottom of Lake Angeline over to the north; I couldn't say how long before that.

Q. Do you know why Captain Mills took you down in the mine to look that over at that time?

A. Well, we frequently went around and visited each other's mine; sometimes we would pick up some information in regard to work, and one thing and another; and I don't know that there was anything very special that we went over this day for. I was asked to go by Capt. Mills. I might have been there two hours examining that drift; probably three hours. I couldn't say to half an hour. I met Capt. Mills over at the mine. He was not down in

the mine when I went down there; we went down together. He was down in the mine the same length of time that I was, and so were the other gentlemen that I have mentioned, Mr. Bradt and Capt. Tregambo.

Q. What seemed to be the purpose of Capt. Mills being there at that time?

Mr. HOYT: I object to that as incompetent and irrelevant.

227 A. Well, I can hardly recollect that.

Q. What did you do while you were there?

A. We just walked around the mine, and seen the workings, and after we seen their workings, Captain Mills said to me, "We will go over here and see our line in through the drift;" I think the drift was to the west of the shaft.

Q. To see their new end of the drift?

Mr. HOYT: "To see our line," he says.

We went through the drift and wandered through, of course, into the ore, and Captain Mills told me that was our line, that drift. There was no doubt but what Captain Mills saw that ore that I spoke of yesterday. It was nice-looking ore.

Cross-examination by Mr. HOYT:

Captain Walters saw the ore too. I don't remember whether Captain Walters went in that drift with us or not; I think he did. I should judge that Captain Mills pointed out the line. I have been in the service of the Lake Angeline Company about three weeks. I worked last for the Cleveland Iron Mining Company. I worked for them last month.

Q. Did you have any talk with anybody about the cost of that drift before you got on the stand?

A. Well, nothing any more than Mr. Bradt asked me, and I knew what the cost of that drift was, and I told him.

Q. Did you have any talk with Mr. Clark on the subject?

A. Well, just about the same as Mr. Bradt that is all.

Q. Why do you say you only had a talk with Mr. Bradt, if you had also a talk with Mr. Clark?

A. It slipped my memory at the time.

228 Q. Your memory is not very good then, is it?

A. Well, not particularly.

WILLIAM TREGAMBO, sworn on the part of the complainant, testified as follows:

Direct examination by Mr. CLARK:

I have been engaged in mining iron ore 32 years, on the Marquette range all the time. I am engaged in the Lake Angeline mine; have been working in that mine about 14 years last past. I worked in the old part of the mine for the first seven years; have worked in the east end mine for the last seven years, from one part to another, daily. I had charge of the work under Captain Mills. I went to work in the east end in 1890, when they first began sink-

ing the shaft. They got down to ore in the beginning of the year 1891. The ore they found there was blue hematite, and it was number one quality. Our shaft has been sunk about 147 feet from the top of the shaft to the first level. We are at the third level at present. The distance between the levels is about 80 feet, that is, on the pitch of the shaft; about 75 feet perpendicularly. The pitch of the shaft would be 80, and about 75 feet straight down. I have been over in the Cleveland workings just across the line on section 10 three or four times; the last time a little over a year ago, probably about fourteen months. I was there with the civil engineer, Mr. Bradt. I saw the character of the ore. I didn't examine the workings very much; I couldn't tell about the drifts; they had stoped their levels up about 25 feet from their main drifts;
229 how many, I don't know. The last time I was there I went down through the Cleveland shaft, through this diorite drift. I went down about one level; that I think was the second level. I should judge by the appearance of the ore it was just the same as that of the Lake Angeline.

Q. From your experience in mining with the same kind of ore in the Lake Angeline east mine, what would you say it would cost per ton to mine and put in the skip and hoist that ore to the surface, per ton?

A. That is the mining of it and putting it in the skip?

Q. Yes?

A. Well, probably about sixty or sixty-five cents; it depends on whether you had any portion of that rock to lift with it.

Q. Taking the expenses, the lower underground expenses, averaging them up, I mean?

A. Well, if you take in part of the expenses of that rock drift, it might possibly cost 65 cents.

Q. Take 100 men working in that kind of ore, in such kind of drifts and cross-cuts as you saw in the Cleveland workings north of the south line of 10, what would you say would be the quantity of ore they could mine per day double shift?

Mr. HOYT: That question is objected to as incompetent and irrelevant.

A. I should think they ought to average about five tons a day, per man. I was in those Cleveland workings three or four times; I couldn't recollect exactly when the first time was.

Q. Now, from the workings in the east mine, and from the examination of the formation on that south deposit; what would you say from your skill as a miner, as to whether it was a deep formation?

A. Well, that is pretty hard to tell; it had all the likelihood of going down then.

230 Q. And that was when you were in there, in the spring of 1896, you formed that idea, was it?

A. Yes, sir.

Captain WALTERS, recalled, examined by Mr. Clark, testified as follows:

Q. I wish to ask you whether you were in this east mine, or the Cleveland workings, just across the line, with the president of the Cleveland Iron Mining Company, at any time with Mr. Mather, or had any conversation with him in regard to this working?

A. I had some conversation with him, and was in the Lake Angeline probably, but not in the Cleveland. That must have been in the summer of 1892. It was before the Cleveland Iron Mining Company put their five drill-holes to the north. We were talking the situation over, and I invited him down, namely, that we had ore on the line; referring to the south line of 10.

Q. What was said between you in regard to the matter, what did you say to him about it?

A. We went down and walked around the mine generally, and then came back and talked over the possible amount of ore that would be over the line, the south line of 10, the north line of 15, and the advisability of putting a cross-cut from their workings into that property.

Q. From their north workings?

A. From their south workings, I call the—looking to the north side of the lake, from their south workings at that time.

Q. The drift from what point?

A. The drift that was eventually put there.

231 Q. From their shaft over on the north side of the lake?

A. Yes, sir; through into these south workings; the project of putting that drift—whether there was ore enough to pay for it, which was the drift that was subsequently put through the diorite.

Q. Now, at that time, from this examination with Mr. Mather with you in this working of the Pittsburgh & Lake Angeline Company, was he able to discover, and did he discover, whether there was any ore there before they did any work?

A. He discovered there was ore there.

Q. Did any one inform him whether there was ore there or not?

A. Why, Mr. Mather was there on the ground himself, and I with him, and we saw it.

Q. What did you say to him about it, if anything?

A. I told him that so far as the ore that was discovered, I didn't think it would be profitable to put a long drift through that diorite, and I put in a word for the Lake Angeline Company, and I told him that perhaps it would pay them better to let the Lake Angeline have it on a royalty; after that they drilled some holes there, and found that the ore still continued.

Q. Those five you speak of?

A. Yes, sir.

Q. And afterwards they put in the long drift?

A. Yes, sir.

Cross-examination by Mr. HAYDEN:

Q. I wish now to call your attention to the 1st of September, 1896, or about that time, again, and ask you upon this subject-matter about which I was asking you before you left the stand, and upon which I may have been a little misinformed, or which I
232 didn't understand; you people were then mining on your side of that line at the east end, were you not, at that time, about the 1st of September, 1896?

A. Yes; I think we were the latter part of September.

Q. Did you not at that time talk about suspending operations over there on the ground that you had reached your Bessemer ore limit, or something of that kind?

A. Yes, sir.

Q. Did you and Mr. Kidder and Mr. Jopling have a talk in September regarding an expression, either on your part or that of Mr. Kidder, that if you stopped mining and they continued right along mining on their side of the line, that they might let some of your ore down into their workings?

A. Well, would I be allowed to state the conversation as I——

Q. I wish you to do so, as you understand it.

A. So far as Mr. Jopling is concerned, I don't know; the conversation was from a business standpoint with Mr. Kidder and myself; some time before that they had caved some of our ore, and it lay loose on their bottom; our company notified Mr. Kidder that we had to close down; I said to Mr. Kidder, It is too bad that we have got to close down and the Cleveland Company continue working; we are bound to lose that loose ore which is down there, which is several thousand tons. And I asked Mr. Kidder if we couldn't prolong the work, if with only a small force.

Q. You wanted to work on your side of the line to prevent your ore going into their workings?

A. Yes, sir.

Q. Don't you remember Mr. Jopling talking to Mr. Kidder in your presence?

A. I really don't at all. It was simply business from our own standpoint, to save our ore; the way you put the question before was they were endangering our ore. That was not, because I
233 didn't know how near they were working, but if they continued working they would certainly come down into our caved ore that had already been caved, which was loose.

Q. Did you see a rough diagram of the situation at the time, which you discussed—won't you look at this diagram and tell me if that does not about represent the situation which you had under consideration in that conversation, or in your business discussion?

A. That is not all loose I speak of. It is ore fallen over our line, and if they continued work on this level, they would let down this upper part; that is the whole thing.

Mr. HAYDEN: This diagram which I show to the witness is marked "Cleveland Iron Mining Company, Ishpeming, Mich., Lake Angeline deposit, vertical section" (Def't Ex. 24).

Mr. CLARK: We offer in evidence the articles of association of the Pittsburgh & Lake Angeline Iron Company and the files of the reports in the office of county clerk of this county. Which show that the Pittsburgh & Lake Angeline Iron Company is a mining corporation, organized under the laws of the State of Michigan, organized on the 23d day of October, 1865; and that it has continued in business to the present time, filing its reports from time to time in the office of the county clerk of said county.

It further appears from the files of the said clerk's office, that the time of incorporation of the complainant was extended by reincorporation under the provisions of the statutes of Michigan, on the 14th day of Sept., 1895.

Complainant rests.

234 EDWIN BALL, sworn as a witness for the Cleveland Iron Mining Company, testified as follows:

Direct examination by Mr. HAYDEN:

I reside at Soudan, Minn., and am in the employ of the Minnesota Iron Company, as manager of the Soudan hard ore mines. I visited Ishpeming in the spring of 1896, in company with Mr. Bacon, Mr. Wessinger and Mr. Armstrong, in the month of March. I did not go into the Cleveland mine, but did visit the Lake Angeline mine, in company with Mr. Bacon, Captain Walters, Mr. Bradt, Mr. Armstrong and Mr. Wessinger. I went down into the east end mine of the Lake Angeline Company.

Q. I call your attention to that part of their east end mine west of their shaft-house and which run up under the bed of Lake Angeline, south and to the south section line of 10?

A. Yes, sir; we went in what is known as the east end of the Lake Angeline in March, 1896. At that time a conversation arose with regard to trespass and the boundary of the place. We went down in the timber shaft, which is on the west end of the property, and the captain took us through the east part of it, and inspecting all the stopes in the different levels; and as we were going to the shaft, we came up to the east end of the shaft, he took us into a place and showed us where the line was between the two properties, stating to Mr. Bacon that this was the line, mentioning that the Cleveland Iron Company had trespassed over that line.

Q. Did he show you any marks fixing that place?

A. Nothing more than showing right in the vein, in the drift where there was some caved ground; he says "Here is where the line is."

235 I am not familiar with the boundary line. He stated the line between the Lake Angeline Company and the Cleveland Company. He located it, saying, "Here is where the Cleveland Iron Mining Co. trespassed upon the Lake Angeline." That statement was made to Mr. Bacon; I was present and heard it. I couldn't say whether Mr. Bradt heard it or not. This statement was made by Capt. Walters, the superintendent of the *the* Lake An-

geline mine, when Capt. Walters, Mr. Bacon and myself were together in there.

No cross-examination.

C. H. HALL, sworn as a witness on the part of the defendant Lake Superior Iron Co., testified as follows:

Direct examination by Mr. BALL:

I reside in Ishpeming, and am agent of the Lake Superior Iron Co. I have the management of the local business of the Lake Superior Iron Co., the oversight of the mine, and the financial affairs and general affairs in this county. I have had charge of the mine as agent something over 23 years. The subject of pumping out the water from Lake Angeline by our company and the other companies was discussed. I do not remember the date of the starting of the discussion. In August, 1893, we commenced our pumping. I have the figures with me. I am not sure about the time of commencing the pumping. The contract bears date the 17th of March, 1892.
236 The question of pumping out the lake had been under consideration by the different companies for a year previous.

Q. Something has been said about the Lake Angeline having been lowered, the water having been lowered prior to that time; do you remember anything about when that was?

A. When the water of the lake was used for city purposes, it was lowered down considerably, I should think four or five feet, previous to the time we commenced pumping. I don't know of any deepening of the channel previous to the pumping out of the mine; then Mr. Howell lowered the channel about five feet, to let off the surface water, that much of it; that was before pumping. That was a part of the job of unwatering the lake.

I had no part in negotiating the contract for pumping the lake. The negotiation was with Mr. Joseph S. Fay, our treasurer. He had the negotiations with the other companies. I had no negotiations with anybody in regard to it. I can state what proportion our company paid toward the pumping of the lake, if you desire. I can read a statement taken from our accounts or books. It is made out up to January 1st, 1897. The original cost of the pumping out of the lake was $31,700.00, of which $\frac{4}{15}$ was paid by the Lake Superior Iron Co., $\frac{8}{15}$ by the Cleveland Iron Mining Co., and $\frac{3}{15}$ by the Lake Angeline Co. The cost of permanent drainage after that, from the time Mr. Howell, the contractor, finished this job, was $20,227.53; $\frac{4}{15}$ of that amount was paid by the Lake Superior Iron Co., namely, $5,401.00; $\frac{8}{15}$ by the Cleveland Iron Mining Co., $10,788.00; and the amount assessed at that time to the Lake Angeline Co. was $4,055.52, of which they paid $1,220.78, and the Cleveland Iron Mining Co. paid the balance, $2,824.74. That last expenditure was for finishing up the permanent drain-
237 age of the lake, which amounted to $20,227.33 in excess of the original contract, and the amount paid by each company I have just read.

Q. That last amount you have read, you say was the finishing up; what was that; was there a balance of water that was not taken out?

A. That was the continuous pumping to get the mud we encountered out of the bottom, and before we stopped trying to get the mud out it amounted to that amount of money, as I remember it, as I understand it.

Q. You say the Lake Angeline didn't pay their $\frac{3}{15}$ of that?

A. They didn't pay $\frac{3}{15}$; they paid $2,120.78 out of $4,055.52. The reason was, as I understood it, that it was more than their proportion; they didn't have interest enough in it to pay, but finally made this compromise. I have not talked personally with the officers of the Lake Angeline Company about it, but that is what I understand.

Q. That was getting the water—finally getting the lake all pumped out?

A. Yes.

Q. When did that expense cease, or when was that expenditure—when was the last of that expenditure made?

A. It was from December 14, 1892, to July 31, 1893, this $20,000.00.

Q. What have you done since that time in regard to keeping the water out, keeping it pumped?

—. In addition to that, there have been—I don't find the date here, but there has been $102.26 at one time paid. By the Lake Superior Company $34.09 of it, and by the Cleveland Company the balance, $68.17. At another time there was a small matter of $31.19 paid by the Lake Superior Iron Company, and double that amount paid by the Cleveland. Those are little small matters—matters that came up from time to time. Then in addition to that, was the cost of the dam and the more
238 permanent improvements that were put in to keep the water from the lake. The dam was at the inlet of the lake, the old inlet of the lake, 40 or 50 rods from the extreme east end; the cost of which was $7,485 19 of which the Lake Superior paid one-third, or $2,495.06, and the Cleveland two-thirds, $4,990.13.

Q. You may state what the object of that dam was, what it was for.

A. For taking the surface water from the east end of the lake into the Lake Angeline flume that had been made by the Lake Angeline Company, this makes a total of $59,608.66.

Q. That is paid by all?

A. A recapitulation—the Lake Superior paid $16,407.68; the Cleveland Iron Mining Company, $35,640.10; the Pittsburgh & Lake Angeline Iron Company, $7,560.78, making a total of $59,608.56.

Q. That was the expenditure of pumping, getting the lake pumped out, and erecting this dam at the east end; have you had any expenditure in keeping the lake pumped since that time?

A. Yes, we have that; the cost of pumping Lake Angeline from August 1, to December 31, 1893, $977.82. Amount paid by the

Lake Superior Iron Company, $899.87; by the Cleveland Iron Mining Company, $77.95.

Q. What makes the discrepancy between the two companies?

A. This pumping is done on the tonnage basis; each company pays in proportion to the amount of ore mined under the lake bed.

Q. The two companies here paying the entire expense?

A. Yes, sir.

Q. And apportioning it between themselves according to the ore mined?

A. Yes, sir; the next, from January 1 to December 31, 1894, the total amount was $7,570.58, of which the Lake Superior Iron Company paid $1,250.66 and the Cleveland Iron Mining Company
239 $6,319.92. From January 1, to December 31, 1895, the total cost of pumping was $4,306.09, of which the Lake Superior Iron Company paid $389.70, and the Cleveland Iron Mining Company $3,916.39. January 1 to December 31, 1896, the total expenditure for pumping was $3,763.12, of which the Lake Superior Iron Company paid $694.33, and the Cleveland Iron Mining Company $3,058.79, making a total expenditure for those four years, or three years and a fraction, of $16,670.61. That is the cost of keeping the water out since it was first pumped out. The pumping is still going on. It is necessary to keep the pumping going on to keep the lake clear of water. The Cleveland Iron Mining Company have some openings through which if the water rises to a certain point, it will run to the bottom; of course it has to be kept out.

They have been exploring in the bed of the lake since the pumping. We commenced exploring January 6, 1895. We bored a number of diamond-drill holes from the surface, vertical holes.

Q. Over what parts of the lake?

A. West of the center of the section, on the southwest quarter of section 10.

Q. On lot 5, the southwest quarter of the southwest quarter?

A. No, in the bed of the lake.

Q. I show you a map of the lake that has been drawn, which we will put in evidence by and by; considering this a map of Lake Angeline, will you point out and tell how your explorations are indicated?

A. All these dots here, they represent drill-holes; these little circles represent drill-holes. The first hole was No. 1 located at that point (indicating), and numbered 1 on the map, and No. 2 and so on, until we had 24 holes bored. They were numbered in the order in which they were bored; and all of these little circles on
240 the map that are numbered represent diamond-drill holes. I have the depth of all of them; they run from the—the least depth is 51 feet, and the greatest depth about 300 feet.

Q. Some of these holes are scattered all over in different parts of the lake. Do you know about where—supposing—here is a pencil mark on the map running for a point in the lake over to meander corner 13?

A. Yes.

Q. Supposing that to be the dotted line of their boundary on either side of the lake, would any of these holes be inside, in the territory claimed by the Lake Angeline Company?

A. There are twelve of them on the inside of that line.

Q. When were those twelve holes sunk?

A. The first hole, No. 1, was drilled in January, 1895; commenced January 6; and ended January 30. No. 2 was commenced March 22, and ended April 14, 1895. No. 3 was commenced April 4 and ended May 4, 1895. Then No. 13 is the next hole, that was south of that line; that was commenced in May, 1896, and ended May 20. The next hole is No. 15, which was commenced May 19th and ended June 2nd, 1896. The next hole is No. 16, which was commenced on the 28th of May and ended June 11, 1896. The next one is 18, commenced June 10, and ended June 26, 1896; the next one is 19, commenced June 26 and ended July 11, 1896. The next is No. 20, commenced July 10 and ended July 23, 1896. The next, No. 22, commenced August 4 and ended August 15, 1896. The next, No. 23, commenced August 23 and ended September 8, 1896. The next, No. 24, the last that we bored, near the Lake Angeline office; that was commenced September 8 and ended September 29, 1896.

241 Q. Do you know whether the officers and agents of the Lake Angeline Company were aware of your sinking these holes while they were working?

A. I know they were; yes.

Q. Did you ever talk with any of the Lake Angeline officers in regard to the place of locating any one of those holes?

A. I talked with Captain Walters in regard to this particular hole, No. 23, which is within 15 feet of the line, for we were not quite sure where the line was.

Q. What conversation did you have with him about it?

A. He told me that their machine shop was located one foot south of the line dividing 10 and 15, which is the line we recognized as our line, our boundary, and I arranged my hole from that; I did that personally.

Q. You put that hole down; did you tell them about where you wanted to put it, or how near you wanted to put it?

A. Well, I told him that—there was a lot of rubbish on the ground, and that stock pile of ore; I didn't care to bother with his ore, and we decided on that point. It was within 15 feet of the line, where it was supposed to be.

Q. Now, you say you considered that line as the line; did you ever have any talk about it?

A. The question was never raised in all my experience as to any doubt about this line being the line.

Q. The line between your properties. Did you ever have any talk with Captain Walters about the exploring south of the line?

A. No.

Q. Whether he had made any exploring, or run any drill-holes up to the line?

A. O, yes; on their property. Yes, I have; Captain Walters was

always doubtful about our vein of ore, from the fact that he had run drill-holes where their vein is back here towards that line.

242 Q. Towards the line; how near to the line?

A. I couldn't say exactly how near, but he said they were back—the diorite ran through here, which I know is true, and it cut off all possible ore, to them at least, run to the line, and they didn't think we had any.

Q. You speak about the mine as the Lake Angeline mine, from which they did this exploring and drove drill holes toward the line; where are they situated?

A. I am not sure that these drill-holes were started from the open pit; I don't think they were working the open pit at all; they were underneath or lower down.

Q. When you were talking with him about the probability of finding ore, and his saying that he didn't think there was any use of working there, what territory were you talking about particularly?

A. We were talking about ore in the bed of the lake, under the lake bed.

Q. About whether you would find any ore in this property of yours north of the line?

A. Yes.

Q. He thought there wasn't much probability of it?

A. That is my recollection.

Q. Did your holes which were sunk there expose any iron ore?

A. Nothing only a trace of ore in one hole, this one which didn't amount to anything, down below.

Q. And these other drill-holes, south of that pencil line?

A. Yes, three holes that have ore—there were four holes, numbered 1, 3, 16 and 13.

Q. All south of the dotted line, south of the pencil line; was there a body of ore extending in any direction outside of that?

A. Nothing only to the northwest.

Q. Have you been after that body of ore?

A. We have.

Q. When did you open that up?

243 A. We haven't opened it up since the 1st of January, 1895, that is, we started a long drift to it, and drifted from this drift, this is our lake shaft, we drifted 910 feet from that point immediately under this ore, under the deepest portion of the ore, in order to reach that body of ore.

Q. That your drill exposed?

A. Yes.

Q. Have you opened it up in any other way?

A. We have opened it up, we drifted on its length on the bottom—I think I have some figures if you wish to have figures; in round numbers we opened it on the bottom, it was 400 feet in length on the bottom; it run up that way; we raised 75 feet and opened up a level the whole length of the deposit, or as far as about this point here; we didn't go the whole length.

Q. What is that?

A. About where the pumping station is, about the furthest east we have worked, or southeast; we opened it up on its length, and cross-cut from foot to hanging, and raised through to the next level above, and continued; we are working four levels.

The pumping station I have spoken of is represented by a small square. This opening has been going on since about a year and six months ago. We commenced that drift the first day of January, 1894, and this work has been done since to the present time. We got into this ore body I think in May, 1896, instead of 1895; we started the first day of January, 1896. We started drifting from the lake shaft, we call it, and we have been opening up constantly four levels without mining, except opening up.

Q. Can you tell us in the first place about the expense of that opening of that body of ore altogether, the expense of sinking the shaft and running the drift and opening up the body of ore?

Mr. CLARK: I object to the statement as incompetent, until it is shown that the witness has personal knowledge of it from the actual fact of work done.

244 A. I am not so sure; I can't separate this particular body of ore; from November 1, 1895, to May 1, 1896, which dates back a little further than what time we stated we commenced driving that drift, the total expense up to January 1, 1897, has been $149,111.22.

Mr. BALL: Has that been principally in preparatory work to mining?

A. That has been preparatory work in mining; it is not all in this deposit entirely.

Mr. CLARK: I move to strike out the evidence as incompetent, it not appearing that it is any of this work that has anything to do with this controversy.

Mr. BALL: Can you tell about the—approximately—the expense of opening up that deposit ready for mining, as you have it now?

Mr. CLARK: We further object, that the work that has been done upon the undisputed territory has nothing to do with the amount in the disputed territory, as it was an opening on their own territory.

Mr. BALL: Go on, if you can tell.

A. The greater portion, nine-tenths, of these figures I give you have been expended there.

Q. Well, that will be sufficient; does that include the drill-holes that you made in exploratory work?

A. It includes everything.

Q. That includes the drill-holes?

A. Yes.

Q. Can you state about the cost of these drill-holes themselves that have been sunk on the land within the property that is claimed by the Lake Angeline according to that mark?

A. Yes, I can give the figures I think; the total cost of diamond-drill explorations has been $8,784.99; I don't mean this was all inside of this pencil line.

COURT: You can give each one separately, and they can be footed up then.

245 A. I can give them by numbers; No. 1 cost $481.27; No. 2, $359.63; No. 3, $500.61; No. 13 cost $331.63; No. 15, $335.80; No. 16, $300.67; No. 18, $311.66; No. 19, $384.86; No. 20, $373.41; No. 22, $374.33; No. 23, $333.72; No. 24, $506.49.

Q. Will you state whether these holes that were drilled over the south of that imaginary line within the territory claimed by the Pittsburgh & Lake Angeline Company exposed any considerable quantity of ore?

A. They didn't, in my opinion; I have not the figures, except my memory; that one hole showed about 30 feet of ore in it.

Q. Which is that?

A. No. 13; No. 16 had about 20 or 25 feet; No. 15 had just a very small amount, I don't remember; it had simply ore; No. 3 had about 90 feet of ore, vertical, good ore.

Q. Do you know whether or not prior to the time this suit was commenced, the agents or officers of the Pittsburgh & Lake Angeline Company were aware of the discoveries of ore you had made there?

A. They were not aware of it at all, and I heard the superintendent of the Pittsburgh & Lake Angeline mine say that he had a map showing the drill-holes in the lake bottom. That was inside of a month.

Q. What was the occasion of it?

A. We were discussing the unequal taxation before the board of aldermen in the city of Ishpeming. He brought this map to show that we had a large deposit of ore, and submitted it to the council, as affecting the question of valuation of the property, increasing our valuation. I think that was about a month ago.

Q. Who was doing that?

A. Captain Walters.

Q. What body of ore did he point out?

A. Some of this deposit of ore in here as being a new find of the Lake Superior Iron Company, and increasing the value of their property, that is all.

246 Q. It was the date the board of review met?

A. Yes, sir.

Q. Did he say anything about the Pittsburgh & Lake Angeline Company claiming any interest in that ore, or affecting the value of their property?

A. No, sir.

Mr. CLARK: I object to that as immaterial and incompetent.

Q. Here is a map which has been prepared, it has not been proved of course, as yet, but do you recognize this as a map of Lake Angeline?

A. I do.

Q. I want to ask you particularly about this northwest corner way down to the west end of the lake; can you tell what the original shape of the shore line was at that point, or whether it was anything like the representation on the map?

Mr. CLARK: I object to that as immaterial and incompetent.

A. These lines, to my recollection, are pretty near the facts.

Q. To the original shore of the lake?

A. Yes, sir.

Q. Do you know anything about this corner of the lake at the east end of that meander line which reads south 80 degrees, west 10.50?

Mr. CLARK: I further object that it does not appear that Mr. Hall is a surveyor or engineer, or knows anything about what he sees on that map.

Q. Do you know whether that meander line, as it is drawn, represents the formation of the lake at that time?

Mr. CLARK: I object to that as incompetent.

A. I know that it does not, that there is a solid ledge, and that meander corner must have been in the water.

—. You say it is a solid rock; does it show it to be bold
247 now where the edge of the water came to?

A. Yes, the marks are all on the shore.

Q. While you were at work sinking the drill-holes, and doing the explorations which you did within this disputed territory, and down along the south line of section 10, I understand you to say that Mr. Kidder and Mr. Walters were aware of what you were doing every day, or from time to time?

A. I am not sure about Mr. Kidder; Mr. Walters did; Mr. Kidder was there from time to time; I don't remember meeting Mr. Kidder.

Q. During all that time, was it ever stated to you by any one on the part of the Lake Angeline Company that you were operating on their property, or had any rights there or any protest or anything of that kind made against it?

Mr. CLARK: I object to the question as leading, and immaterial and incompetent.

A. No, sir.

Q. State whether anything was ever said to you by any one representing that company in regard to the matter, as to whether you were trespassing on their property or not.

A. Nothing whatever.

Q. When did you first hear of any claim that this territory within those lines belonged to the Pittsburgh & Lake Angeline Company?

Mr. CLARK: I object to that as immaterial and incompetent.

A. I first heard—I think I saw a letter from Mr. Kidder; I think in October possibly; I have not the date with me, of last year, 1896.

Q. Mr. Kidder testified to giving notice, is that the one you refer to?

A. Yes, sir.

Q. Did you ever have any intimation before that, that there was any such claim made?

A. Nothing whatever.

248 Q. Before that day, in all the transactions, or in all that was ever done between you and the Lake Angeline Company in regard to your adjoining properties, what was taken for granted—was anything taken for granted, or considered as the boundary line?

Mr. CLARK: I object to that as incompetent and leading.

A. The section line between 10 and 15 we always considered the boundary line; and that has been so for 23 years to my knowledge. Our company has been mining and occupying the northwest quarter lots 4 and 5, and the other forties in the northwest quarter of 10 since about 1857 I think.

Q. There has been something said about some buildings, a carpenter shop and machine shop built on the made land out there over the line of section 10; did you ever have any—what was your idea always about that?

Mr. CLARK: I object to the question as incompetent and immaterial.

Mr. RUSSELL: We object to the idea of the witness

Q. Whether you ever had any idea, or what you really supposed it was always?

A. I knew there were buildings in that locality, but just where they were with reference to the line I did not know. I did not know whether they were over the line or not.

Q. What was your supposition about it?

Mr. CLARK: I object to the question as immaterial.

A. My impression was they were on this side, of course; they might have been partially over the line.

Q. By the line you mean the section line?

A. Yes.

Q. I said the northwest quarter; I mean the southwest, the property occupied by the Lake Superior Iron Co.; did you ever have any line run for the purpose of knowing whether they were over the line or not?

A. I never did.

249 Q. Do you know what the other buildings are that are there besides the machine shop and carpenter shop?

A. There was a small wooden building on the north side of the section line, as I understand the section line today; that is the only building.

Q. What is it?

A. From the evidence I heard yesterday, it is a powder-house, a small wooden board building, one story. I couldn't exactly give the size. It is a building of perhaps 20 x 30, possibly not so large.

Q. State whether in that place it was ever a matter of any very particular concern to your company, whether that rock formation which was made out into the lake was used by one or the other.

A. We never considered it of any special value: the Lake Ange-

line Co. were permitted to waste their rock over there from their open pit into the edge of the lake; it was no damage to the Lake Superior Co. that I know of. It made no objection to it as far as I know; and the Lake Angeline Co. never did, to my knowledge, claim any right in that part of the lake, or to build over the line. The question was never raised between us and the Lake Angeline people.

Q. During the period from the time of the pumping contract and your explorations, down to the time when this claim was asserted in October, 1896, were you aware of the operations on the east end by the Cleveland Iron Mining Co.?

A. Not personally, I was never in the mine. I heard that they were conducting operations down to about that section line; frequently heard the matter discussed, and that they had been trespassing both ways. I heard that the trespass related to the territory at the section line. I am familiar with the map showing the soundings of the lake previous to pumping the water. I have heard of something about what is called the diorite fold passing
250 through the lake in sort of easterly and westerly direction. I should say that the diorite did not have any effect in keeping the water from one side or the other of the lake. It extends above the ordinary bottom of the lake at some points. It does not form a partition between the two parts of the lake, so the water can be kept out of one side, or any part of it, and not out of the other.

Q. Can you state whether mining within this disputed territory that has been mentioned could be carried on without pumping the water out of the whole lake, I mean in the first place without pumping it out?

A. Why, the water had to be pumped out down at least 11 or 12 feet, to keep the water out of the Lake Angeline portion, that portion of it south of the section line.

Q. How about mining over north on this disputed territory up to that equitable center that they tell about?

A. The water will find the bottom of the lake; it is 43 feet below the surface of the water, was when we commenced pumping. The water will go to the bottom from any quarter, no matter where. Mining in this disputed territory up to the equitable center, so called, couldn't be carried on without pumping the water out. A portion of the water would have to be pumped out, at least 12 feet of the surface kept out of the lake, or it would run into the Lake Angeline property; it would have to be pumped out to mine anything.

Q. Do you know about what the depth is at that central point?

A. I don't know as I understand what point you refer to.

COURT: This is the point (indicating).

A. Forty-three feet is my recollection, between 42 and 43 feet.

251 Q. You have spoken about a map showing the depth of the lake in different places; is this the map you refer to?

A. Yes, sir, this is the map. The soundings were made under the direction of the Cleveland Iron Mining Company. I don't know

who the engineers were who did the work from which this map was made. This is the map from which I got my figures.

Cross-examination by Mr. CLARK:

I am the agent of the Lake Superior Iron Company. Captain Johnson preceded me as agent. Joseph S. Fay is the treasurer of the company. I had nothing to do with making any contracts as to the pumping, and I had nothing to say to the Pittsburgh & Lake Angeline Company's agent about it, or negotiating the contract that was made. That was done by Joseph S. Fay. He was the general manager of the property in that respect; he was in all respects. I was the local agent in charge of the mining operations of the mine, and its finances. Captain McIncroe was the mining captain in charge of the mining. He left about six months ago; he has not been succeeded by anybody. He was captain of the mining operations, one branch of the business of mining since I have been there, that is, hard-ore mine. That was not the one nearest to the lake. When I went there a man by the name of Captain John —— was in charge of that mine. He is not in charge now. Several have succeeded since; one was John Geary.

Q. Who has been during the last ten years?

A. Captain James Trebilcock.

Q. In the mine north of the Lake Angeline and near the shore there?

252 A. Yes, sir; he has been mining captain about 12 or 15 years; I am not sure as to that exactly. Under his direction, the sinking of a shaft and driving under the lake in a southerly direction, was carried on. I am not a miner myself. I never struck a drill. I struck a man's hand once trying to strike a drill. I am president of the First National Bank of Ishpeming. I am the general local financier of the company when Mr. Fay isn't there.

Q. Your mining operations are entirely under the supervision of Captain Trebilcock and the other mining experts that work in the mine?

A. They are under my supervision.

Q. What I mean is, the actual prosecution of the work in the mine.

A. Yes; they take their instructions from me.

Q. You look over the maps in the office?

A. I examine them constantly. They not only tell me what they have done, but I see the work too. I go down in the shaft occasionally.

Q. How often do you go down in this shaft north of Lake Angeline?

A. Latterly I have not been down very often; in former years I used to go down nearly every day; during the last five years once in a few months. I now go more from the maps. We have the maps constantly; we have the maps made and extended from month to month to show the workings. Mr. Rees has succeeded Mr. Fay as general manager of the company. He is here in court.

He resides in Cleveland, and is president of the company and general manager; I am not certain that Mr. Rees is president of the company. The original cost of pumping was $31,700.00. I paid the bills; I signed the checks and drafts.

Q. You speak of the cost of permanent drainage, amount-
253 ing to $20,227.53; what do you mean by permanent drainage?

A. This particular item of $20,227.53 was made up of flumes and pipes and other necessary works for permanent drainage. That was put in from December 14, 1892, to July 31, 1893. It was after Mr. Howell got through with his pumping contract. That was for permanent drainage, permanent pumping. Part of it was for pumping machinery. I couldn't analyze the bill here; it was labor and material and supplies to carry on that pumping. The bills will all be here after the train gets in, but I couldn't give them now.

Q. You really now have no knowledge except as it is handed in to you by somebody, as to what the cost of the machinery was?

A. From the knowledge I have of our proportion of this cost and having the bills showing the whole cost.

Q. You simply know you paid a certain amount or proportion of this $20,227.53, but how it was applied, and what was applied to each particular branch, you don't know?

A. I do know when I can get the bills. I only know what the bills show of course. It has got to be substantiated by the Cleveland Iron Mining Company. I only know what the bills show.

Q. You said in your direct examination, did you not, referring to this $20,227 53, "What was that last expenditure for?" "It was for finishing up the permanent drainage of the lake which amounted to $20,227.53 in excess of the original contract, and the portions paid by each company I have just read." "That last that you say was the finishing up, what was that?" "It was the continuous pumping to get the mud out that we encountered on the bottom of the water." Do you say that is correct, that this $20,227.53 was pumping up mud after the original contract was completed?

A. A part of it, yes, sir.

254 Q. It was not all for doing that?

A. No; it was for locating the machinery and purchases and labor, to keep up the permanent pumping, of which our company was to pay one-third and the Cleveland Iron Mining Company two-thirds, by agreement between all three of the parties, the complainant and the two defendants. The Pittsburgh & Lake Angeline Company had nothing to do with that part of it.

Q. Now, in figuring up the expense in this matter, in this case, why do you include that as one of the expenses in the pumping of this lake, making the total $59,608.56, by adding that to it, by adding that $20,000 to the original pumping?

A. It shows the cost of pumping up to the present time.

Q. Irrespective of who was bound to pay it, under the original contract?

A. Yes.

Q. You know that it was understood, do you not, that the Pitts-

burgh & Lake Angeline Iron Company was to furnish the flume that goes across the property, to carry off the water; and that the regular pumping, keeping up the drainage since the original contract was completed, was to be done by your company and the Cleveland Iron Mining Company?

A. Yes.

Q. And that the flume which the Lake Angeline Company furnished and took care of, was their share?

A. That is the way it was understood; that is the way I understand it.

Q. And that was the reason why they paid no part, or a very small portion, of this $20,000.

A. Yes.

Q. Now, has the Pittsburgh & Lake Angeline Company kept up this flume for the carrying off of this water?

A. Yes, sir; as far as I know.

Q. And these different items of drainage since the original contract, except the keeping up of the flume by the Pittsburgh
255 & Lake Angeline Iron Company, were all to be paid, the Cleveland Iron Mining Company two-thirds, and your company one-third, were they not?

A. Yes, sir.

Q. On a tonnage basis, wasn't it?

A. O, yes, on a tonnage basis.

Q. Between your company and the Cleveland Iron Mining Company?

A. Yes, for permanent pumping.

Q. Did you have any conversation, either with the Cleveland Iron Mining Company people or the Lake Angeline Company people, with regard to this claim that the Pittsburgh & Lake Angeline Company would not be benefitted with this permanent pumpage of the lake, that lay north of that diorite formation; did you ever hear that talked over?

A. I never heard that until I heard it in court here.

Q. Now if that diorite formation extended through the lake easterly and westerly, as Mr. Kidder and Mr. Bradt have described, after the pumping of the water away below the top of the diorite formation, do you say that it would make no difference?

A. If it extended through the lake its full height it would, but it does not.

Q. Suppose the water was pumped down to the top of the diorite bluff, as it does extend through, wouldn't it be a division of water as well as of ore between the two mines, after you got down to the diorite bluff?

A. No.

Q. Have you ever seen it?

A. I have; I have been down on that bluff frequently.

Q. Is diorite a porous rock?

A. It is a diorite rock.

Q. Is diorite a porous rock, or close tight rock?

A. Where it has been exposed to the weather it is somewhat porous on the surface.

Q. Do you mean to say water runs through diorite?

A. No, sir.

256 Q. If it was a diorite bluff in an easterly and westerly direction through that lake, as they have described, it would be a division of the flow of water, or the drainage of the water, as well as a division between the ore bodies, wouldn't it?

A. I don't know as I get that.

Q. If this diorite bluff or diorite division, or fold, as Mr. Kidder calls it, extended in an easterly and westerly direction under the lake, if you pump the water down to the top of that diorite hill on each side of it, from that down it would be a division between the water flowage, as well as a division between the ore?

A. It would be if it extended from the east to the west under all the lake, but it does not.

Q. How do you know it does not?

A. I know it from observation.

Q. What observation have you had to know that?

A. I have been on the ground.

COURT: He means it does not extend to the surface of the bottom of the lake all the way, that is, up as far as the natural bottom of the lake; is that what you mean?

A. Yes, that is what I mean.

Q. Do you mean to say that diorite bluff does not extend for the full length of that lake, and that you know it?

A. I do, yes.

Q. Where is it cut off?

A. It cuts off some distance east of the north side of the center line of the lake; I mean to say, a pump placed in the deepest point of the water of that lake would pump the water bottom all out; all the water of the lake would run out to that center, 43 feet.

COURT: That south of the diorite formation, as well as north, because it does not extend the whole length east and west, as I understand it?

257 A. Yes, sir. I heard the statement of Mr. Bradt that this diorite formation ran along at this point as marked diorite wall.

Q. Do you mean to say that diorite formation does not run clear across this lake down in the bottom of the lake?

A. It may below the bottom of it; I mean to say the water at this point will run to that point there, which is the deepest point in the lake, and from every other point it will run to that.

Q. You say this diorite bluff does not run clear across the lake below the bed of the lake?

A. I know it is 40 or 50 feet below the bottom of the lake, by drill-hole test.

Q. In driving these drills, you stated 900 feet across, you cut that diorite bluff, didn't you?

A. We went into it a certain distance; I should think perhaps 400 feet. We drove a drift through 910 feet; to be exact, about 400

feet of that was ore formation, that was lying north of the diorite. I should say we drove across in diorite about 500 feet probably.

Q. So that you knew the diorite which Mr. Bradt has described as running in an easterly and westerly direction did go through and divide the north formation of ore from the south formation that you struck with the drill, where you got 80 feet of ore; that was true?

A. O, yes, that is true, but I didn't understand your question; I don't dispute the diorite going along the bed of the lake, but it dont prevent the water running to the center of the lake from any portion.

Q. What you mean is, you couldn't pump out one portion of the lake and make the lake dry without you pumped the whole business?

A. That is what I say.

Q. But that after it was pumped out entirely, clear down
258 to the 43 feet of depth, that it could be kept dry the whole of it, by simply pumping from this lowest spot?

A. All the surface drainage would go to that point.

Q. If it had been pumped from this lowest point in the lake, as previously pumped out, that would be the permanent drainage you speak of, of water?

A. Yes, the permanent drainage is what water is coming in from the surface all around and centers in the middle of the lake.

Q. And all this lake is being kept dry from this lowest spot which I understood you to say is north of this diorite?

A. Yes.

Q. When that is kept pumped out, you don't mean to say that the water that would be below that 43 feet deep would flow over the diorite to the south side?

A. No.

Q. Or from the south to the north?

A. No.

Q. So that the drainage that would run in there on the south side, south of that diorite would be taken off by the flumes as Mr. Kidder has referred to, and Mr. Bradt?

A. It couldn't be taken off by flumes. The flume is on the surface; there is a pipe at the south side, and it is carried by a pipe and deposited there. That carries it off successfully; it takes care of the most of it.

Q. You say you didn't even know that that machine shop and carpenter shop and magazine, and all those buildings, were over the south line of 10 for all the years you have been there, north of the south line of 10?

A. The machine shop has not been there all the years I have been there, by a good many years; it is rather a modern institution. It was built probably 10 or 11 years ago; I do not know the date. I cannot tell when the carpenter shop was built. Not a word to my knowledge or recollection, has ever been said
259 between myself and the agents or employees of the Pittsburgh & Lake Angeline Co. as to the boundary line between

the two companies. I always took it for granted that the section line dividing sections 10 and 15 was the boundary line. I never heard anything to the contrary.

Q. In fact, you had nothing to do with disposing of the real estate of the Lake Superior Iron Company, giving it away, or selling it, or anything of that kind?

A. No; that was a matter for the directors. Mr. Fay had that in charge under the directors, and I understood the directors, under the action of the stockholders of the company. I understood that I had charge of the mining, and for that I was responsible, and for nothing else, and that was the fact.

Q. Now, referring to these drill-holes on your map that you offered yesterday, and to the dotted line which Mr. Ball referred to as marked on your map, corresponding to the one on Exhibit F that we have offered, north 51 degrees 49 minutes west, you say there were 12 drill-holes; now you say four of them had ore?

A. Four had ore.

Q. One had 90 feet. Now looking at this dotted line I have referred to on Exhibit F that corresponds with the one in pencil on yours, can you point out about where that would be?

A. About where the drill holes would be?

Q. This 90 feet?

A. That is the drill-hole right there (indicating).

Q. Then it was just south of the little parallelogram marked pumping station or scow?

A. Yes.

Q. How far from it is that pumping station, would you say?

A. I should say 20 feet; it is at the edge of the platform leading around; it is 100 feet further south. The long drift ended in
260 the diorite. The bottom of the drift was in diorite, the whole distance after leaving the ore formation on the north side, about 400 feet.

Q. Did you drill any holes from the end of that drift before you drilled the one that struck the 80 feet of ore just beyond the scow?

A. Yes, we drilled a hole, I think we have a map showing it. We drove a hole in a southwesterly direction 488 feet in length, according to my recollection now; and this was from the end of the drift. That would be under that dotted line. The hole would cross that line. Nothing was found but diorite in the hole showing that the diorite continued under the bed of the lake entirely, instead of ore.

Q. You speak of three other holes with the one that had 90 feet, that had ore in; can you give us the location of those, about where they were?

A. They were within 75 feet of that first hole; 75 feet in a sort of circle, north of the one that struck the 90 feet of ore, north and a little further east; all south of that dotted line. We did no drifting or mining south of the dotted line. My recollection is from our maps that we haven't been east of that pumping station.

Q. So that this expense of mining that you mention as $149,000.00

was simply mining in this territory that now is undisputed, except this drilling that you have mentioned?

A. Yes; I would like to correct that statement I made yesterday with regard to the time that this long drift was started; I said it was started the 1st of January, 1896; it was started the 1st of November, 1895.

We now have a shaft on the north side of the lake on lot 4, section 10, near the shore of the lake; and from that we have carried on extensive mining under the lake north of this dotted line I have referred to; we have carried on mining there a good many years.

261 Q. And the mining you have described, and different drifts and stopes and levels you put in?

A. Yes, sir, as described yesterday; that is, this expense comes within certain dates I have given.

Q. But the only portion of this $149,000 00 you now speak of as having been expended south of that line would be the drill-holes.

COURT: About $5,000.00 it figured on these 12 drill-holes within your dotted line.

WITNESS: It would be $4,794.08.

Q. The other was done on their acknowledged territory, I understand, not in controversy at all?

A. Yes, sir.

Q. You spoke of meeting Capt. Walters at the last board of review in the city of Ishpeming?

A. Yes, sir.

Q. And he referred to this valuable work you had done and the ore you had under Lake Angeline?

A. Yes.

Q. As referring to the value of your property in proportion to the value of their mining property?

A. Yes.

Q. Now he referred to these mining operations you have now just described, didn't he?

A. He simply referred to the diamond drilling we had done, and what we had discovered. He did not refer to our mines as we were carrying them on, as well as drilling; he simply referred to the deposit we had found by diamond-drill work, as being very valuable, increasing the value of our property. Nothing particular was said about it, only he exhibited a map to the council which I didn't handle at all, having a certain number of drill-holes on it; we had discovered a vast amount of ore, he said. He didn't know that he had drilled these 24 drill-holes over the property, because he hadn't drilled them when he had his map made. We
262 had drilled I think about half of it. I think he got his map from our engineer, Mr. Thompson, and Mr. Thompson left us long before we completed our drilling. He did not specify any particular drill-holes.

Mr. HOYT: I would like to ask you a question or two; as the agent of the Lake Superior Iron Company here, and representing

the company here, was it or was it not your business to know the location of the company's land?

A. It was.

Q. You were familiar with the ownership of the lands belonging to the Lake Superior Iron Company, and their bounds and metes, were you not?

A. I am supposed to be.

Mr. CLARK: I object to that as immaterial.

Q. During the whole time you were here, you never heard any claim made on the part of the complainant or any one representing the complainant, that they owned north of the section line, the south line of section 10?

A. I never heard it until October last.

Q. Now I want to ask you a question in regard to conducting mining operations between these dotted lines on Exhibit F; where is the deepest point in the lake?

A. The deepest point in the lake is the point about here.

Q. The deepest point in the lake is about at that point—the hydrographic map will show?

A. That scow is 20 feet at least above the lowest point in the lake.

Q. Let me ask you whether or not it is, or would be, practicable without keeping the lake permanently drained, to mine in this territory here?

A. No, sir.

Q. I mean the territory within the dotted lines as shown on the map F?

A. No, sir.

263 Mr. BALL: In answer to rather an assumption made by one of Mr. Clark's questions, you seem to say that you were merely local manager here while Mr. Fay was away from here; did you mean to say that?

A. I didn't understand it that way.

Q. Does it make any difference with your power or authority whether Mr. Fay was here or not while he was an officer of the company?

Mr. CLARK: I object to that question as incompetent and immaterial and nothing to do with the case.

A. Not at all; I have certain delegated powers.

Q. During this time of these workings you have described in the year 1896, were you underground so as to examine and see where the workings were, and what was done?

A. I am frequently underground, yes, sir. And when I testified to that, I testified from my own observation. I go down to direct the work underground myself. I was general manager of the mine under Mr. Rees. Mr. Rees is my superior officer. He depends upon me to manage the affairs of the mine. He is treasurer and financial manager of the company. Mr. Mattison is president now I never had any correspondence with him in connection with the mining affairs of the company.

Q. In regard to the expenditure of the twenty thousand and some hundred dollars, which you said was the winding up or balance of the pumping out of the mine, the mud, etc., did I understand you that it was the arrangement that your company was to pay one-third and the Cleveland Iron Mining Company two-thirds?

A. No.

Q. You seemed to say that in answer to one of Mr. Clark's questions?

A. No, we were to pay on a tonnage basis.

Q. After the contract which you say cost you something over $20,000.00 to finish up the pumping of the mud left in the
264 bottom of the lake, that wasn't considered in Mr. Howell's contract, was that to be paid for, you one-third and the Cleveland Company two-thirds?

A. That is the way it was paid.

Q. You spoke something about assessing to the Lake Angeline a portion of it?

A. Yes, I will take that back; we paid four fifteenths and the Cleveland paid eight-fifteenths of that $20,000.00, in the same ratio that we paid the others. The Lake Angeline Company declined to pay all the share we claimed they should pay. After that the payment was apportioned to the tonnage of the mining of the two companies.

Mr. CLARK: Wasn't all of that mud pumped taken from the hole north of the diorite division?

A. It was.

Mr. BALL: Do you say that all the mud of that last pumping was from territory north of the diorite range?

A. It was; it came from various parts of the lake.

Q. Mr. Clark's question was intended to convey the impression that all this mud pumped out of the lake lay north of the diorite fold?

A. It principally did lie north of the diorite fold anyway; it had drawn into this low point.

Q. As the water was exhausted, the mud sought the same common center?

A. We pumped it out from the lowest point, all the mud.

GEO. P. CUMMINGS, sworn on the part of the defendant Lake Superior Iron Company, testified as follows:

Direct examination by Mr. BALL:

I reside in Marquette; have resided here forty years. My
265 business is engineering and surveying. I have been engaged in that business since I came here, at times, and before I came here I was in the same business. I have not followed it continuously here; I should think about half the time.

I know Lake Angeline and surrounding locality. I have known it ever since I came here. I have been familiar with some of the lines connected with it for something like 15 or 20 years; made surveys around the lake and at the lake at different times. I think I

first went there to make surveys somewhere about 1880, on the south side of the lake, on the south shore, connected with the southern part particularly, from the southeast corner to the quarter corner. I was there again only a few years after. I can't tell just the time; there was a question about the position of the quarter corner on the south side, and I was there at that time; I don't remember the date, it was probably two or three years after the first survey I made there.

Q. You say this was near the quarter corner; in which direction from the quarter corner, the second time?

A. I had to run the east line and south from the quarter corner, dividing the section south. I did this work for the Lake Angeline Co. I was not locating the section line particularly; the object was to divide the northern portion, north half of section 15; in order to do that, I must locate that quarter corner, as well as both the corners. I went to that lake so as to know of it, a few years after I came here in 1857. I noticed the height of the water through the lake at that time. I noticed that particularly at that time, and after that, before I ever did any surveying there; I noticed the water many times; noticed that the water came up on the north side to the vegetation, that is to say, there was no beach on the shore at all showing.
266 The vegetation was trees and shrubbery. I can find that line of vegetation now on the lake. I never took the measurement so as to show the height of the water before it was pumped out. I have been recently to make a survey of the lake. I made a map of the survey. This is the map I made. I just finished the survey; commenced the work on the 3d day of June, 1897. I ran meander lines, beginning at the points as the survey was made, beginning at that meander corner between sections 10 and 11, and running around. I used the field-notes as a guide. I started from the point named in the field-notes from meander point 11. I run the lines on the ground around the lake as shown by the field-notes. I have marked them out here on this map correctly by courses and distances, as given by the field-notes. I have marked on this map what was the original lake boundary, the lake shore, as near as I could get at it, beginning the survey at meander corner 11, around so far as this blue line continues, from that point back to the north side of the lake. The blue line is the probable position, or very nearly so, of the original shore. I measured from the intersection of these lines dividing the southeast quarter of the section into quarters, forty-acre lots; from that intersection, I measured to the center line of the section on the 16th corner, which would be between the east quarter corner and the center of the section; I measured from this intersection up over the hills to that place. I found 55 feet—I found my notes gave me—I measured 55 feet level—it was on the ice in the winter; then I judged from what work had been done that wasn't the original—there had been work done there; I judged somewhere about 25 feet from there would probably be the position of the shore line originally, that is,

on this intersection of this sixteenth line. We found the
267 shore line in here where it is marked; that is on the shore line, marked by a continuous blue line; it was most of it exact, but right at the corner I had to use my judgment; I didn't get the exact height of the shore line, but I got down and found the original bank; I dug in a pit, and the original bank was there. I mean, I dug through the sand this summer, and got within three feet, I think it is 3.6 of the height of the original shore, and I know at the time I made this survey I run this line across and measured right along at that point where that breaks off; it was abrupt where the bank which I suppose was, breaks off, and I judged it to be from five to ten feet, from the pit which I dug south to the original shore line. I never determined the height of the water until now; never had any cause to. I determined it by the appearance of the rocks, and vegetation that has been growing around on the shore, and on the east portion also, the rocks show; and there was one place there is a little bush that has grown out from the rock. I took levels from there.

I could tell by the vegetation line the original height of the water; I couldn't tell exactly where the water came from, on the rocks; I went more by the vegetation by the roots of the stumps; I commenced here assuming it to be about the original thing, and leveled around and leveled across to here. Here is this point, this rocky point west of meander corner 12, in setting my instrument there, and getting my height of the instrument I was a little over half a foot above my datum that I started, and with the instrument, with the level I could sweep around the whole of the shore which was exposed; the east end came below the roots of the stumps, some stumps two feet and a half in diameter, that is, on the north side of this point.
268 There is a little point there, on the north side of lot 7; I don't know about the number of the lot. I arrived at the shore line at the point marked near the lake shaft by digging near the Lake Superior Iron Company lake shaft, a short distance southwest. I dug pits all along; I got just the same height of elevation. I dug six pits. I could judge when I struck the shore line, by the appearance of the soil, or the sand. It was a change; what had been filled is so different from the original bottom we could distinguish instantly when we struck it, the material that had been filled in on top. We could tell when we got through that material and struck the bottom. That height was the actual height which I assumed here to be, or took it to be, from the marks to be the height; that height I obtained, or within two or three-tenths, one side or the other. I leveled it.

Q. Was there anything else in that west line towards the bottom, to tell the shore line?

A. Nothing shown to me; I could see nothing only on the bottom of the pit, on the shore, the original shore; it is all covered up; the pits were from four to six or eight feet deep, some of them, and some less. We found roots where it was on the land; in our pits we found among them on the land this vegetable mould, you could

distinguish the position of the original surface by that. When we got down to the original bottom through this material that had been placed on shore, we could tell by the appearance of the bottom whether it was on the original land or the portion that was under the water; we would have two pits, one on the land and one in the water, we could judge, and put our line between them. The part under water was sand; what was filled in was this red clay and soil that comes from the surface. The original land that was
269 outside of the edge of the water was vegetable mould, black vegetable mould, roots among that in some places.

Q. From the point where your shore line crosses the north and south section line of 10, and for a little distance west of that, what did you find along there?

A. We found roots to some extent, but not much; there was woody matter sometimes, and small roots.

Q. Did the ground you found appear to have been washed with water to the roots of the trees?

A. Well, in that place, in those pits it was too high; it was above the—there wasn't any appearance of its having been washed with water; that was on the land.

I found there were stumps there, but they were above the surface of the water. I can't remember exactly the distance of the stumps, but something like 40 feet, I should judge, from the pine stump to that line, and not from the shore line, but from the second subdivision line, something like 20 or 30 feet back from the shore line; I mean to the north. The shore line going north rises very much; there is a gradual slope directly; and then at the distance of 100 or 120 feet it rises faster. I didn't have time to level up, to see how high the meander line that crosses the north and south quarter section line rises; but in taking my measurements, I took the vertical angle and in a distance of 200 feet my vertical angle would give 22 deg. and 20 min.; that would give something like 70 feet; but my meander line was less than 200 feet; I made level measurements back 173 feet north. The point on the shore was 15 feet above the shore line, and I got something like probably 40 or 50 feet more, about 40 feet higher than where I was. It was about 15 feet above the shore line. My estimate of the entire height was some-
270 thing about 60 feet; I can't tell exactly, because I didn't take my angle at the exact point where the meander line is, but did somewhere in that vicinity.

Q. This point where the meander line crosses the quarter line, about 60 feet above the point where the shore line crosses the quarter line?

A. Yes, sir.

Q. What would be the distance between the quarter line where it crosses the section line, and the meander line due north of that subdivision on the north side of the lake?

A. 283 feeet.

Q. The distance from the point called shore line where the quarter line of the section crosses, northerly to the meander line where it crosses the quarter-section line, what is the distance?

A. About that; my point there was 110 feet north of my assumed shore line, or actual shore line as I considered it to be. I have not marked it on the map. I did not measure the distance at any other point. The scale of the map is 100 feet to the inch. I have shown the shore line around the whole lake as far as I found it; the dotted line indicates the probable position of it; and the shore line as near as I could determine.

Q. From the point down on the west part of the—where there is a corner shown, what is the character of the shore?

A. Mostly rock; just a little ways it is sandy, and some boulders; here is solid rock around here, and then large rock all around the shore. It is quite precipitous; it is quite steep; it is quite bold. There is a little point of blue—that is really where we did get the right height for the shore, where there is a little blue mark, crossing the meander line; we actually got it in that pit there. That is at the southwest corner; also at the meander corner 13 here it was exposed We got the shore there; here we dug pits, and we found
we were in the water, that is, we were too low; and the first
271 course south from the meander corner; we dug along this line and dug back here, but we couldn't determine it exactly; it has been filled there, but we could say we found it here; here is a part of the shore; this is all gone down, all caved here, but on that edge it wasn't; the ground wasn't moved apparently; and all along in there there was debris and little brush piled in, and you could see. It is just south on the second course of the meander line, the east and west course there.

Q. Were you familiar with the west end of that lake before the water was pumped out, and when the water stood at its old level?

A. I was.

Q. Were you there before it was filled in, so that you knew the original shore, were familiar with it?

A. I was familiar with the original shore there.

Q. Do you know anything about whether it is correct or not, this curving in of the shore?

A. I think it is approximately correct, because I know there were tracks in there.

Q. What kind of tracks?

A. The first railroad tracks built there that crossed that, and there was a culvert put in, and the water filled back in a basin, on the north side of the railroad track. I don't think I have got it out as far as it is, but I didn't want to exaggerate. I represent that line outside of the meander line; that is my judgment; I could judge of the original. With more time I could determine more accurately and have located the dotted line closer to where the water would come out; at that point near the end of the third course on that line, we found a big pine stump, and digging at the roots we found sand and the original earth on the side; we got the exact shore line. The stump itself was leaning toward the water toward the lake; it seemed
to have stood on the shore, because a good deal there was sand;
272 we could see the stump as I say along here under this. I did not see any marks on the stump itself, or the roots, any

water marks; it had been covered up so long you couldn't see; if it was opened we could do it. From that point on to the west we determined the exact shore line to that angle, that is near it; the fourth course east of the meander post; the meander line and the shore line very nearly coincide; further east to the section line.

I dug a pit too, and it was two or three feet under water, that is; midway of this course running to the section line. That is meander corner 14. I dug and found just north of the corner a few feet, the sand of the lake bed, and the proper height for the shore. We run the shore line in that lot No. 6 around, but that has all been dug; there is a canal there, this canal that has been spoken of, and there is a railroad that is all torn up; you can't see anything of the original surface. We took the meander line for the shore line. Running east of that we found it was dug up to there, where that continuous line comes, that is, east of meander corner 15. We traced it by a dotted line for a distance, and then came to the continuous blue line; there we got the actual measurement of the height; the shore has not been disturbed, and we took our levels at that point.

Q. What indicates the shore line at that point?

A. Where we got that the continuous blue line—is continuous to that point.

Q. What kind of shore is that, what is the character of it?

A. Gravel, sand and gravel.

Q. So you could tell exactly where the shore stopped?

A. You couldn't tell except by the level, it is all grown over there.

273 On this gravel there was nothing to indicate and show the line of the shore. At the last meander course the ground has frequently been disturbed by an earthquake; it is all fallen in; it has been mined and the ground has fallen in. On this east end, we found the actual shore line, near the southeast corner, and traced it all the way around there, around the east end to that point, as shown by the continuous line. We run those lines for a base, and measured from this line, the meander line as we run, measured from that at points to the shore so as to determine, by the character of vegetation, old roots, all through. You could tell the exact shore above the bed of the roots, the original vegetation; running on west from there, it is all covered up.

Q. Where the dotted line——

A. Here are stock piles and docks.

Q. The dotted line to meander post 16?

A. It runs to the meander post on the course of the original meander line; from there on we found the original shore; we found the shore itself; we found it at meander post 16. We dug there, and found the proper height, and took that first angle, and this all around here is bare, there has nothing been put on it, that is, near the west end of lot 7. We determined the shore line the whole distance of the blue line about on this map, we determined it by measuring from our meander lines which we run; we could see it all the way. It is a bold shore, big boulders scattered; there were

large heavy boulders all along around here; here is a rocky point, but the shore line is all heavy large rocks.

Q. Any vegetation?

A. To this point here; it was some sandy up to this point, up to the end of the blue line running east; it was sandy there, and not so bold. There were old stumps there, and roots and marsh.

274 There was a large stump two and one-half feet in diameter near that point, near the east end of the first course running east; pretty near that angle on the shore line. I should think the stump was two feet and a half in diameter. It was within five or six feet of what we call the shore line.

Q. On west from that continuous blue line—or east, you have a continuous blue line until you get to another continuous line, that dotted line; how did you judge of that shore over that distance?

A. I took it from the meander line. It is all fallen ground; that is, an open pit.

Q. Near the east end there is a continuous blue line running along that you have told us about before.

A. Yes; the same character of shore around here.

Q. Does this line within the continuous blue lines and dotted lines together show the boundary of the actual shore of the lake, as near as you can get at it in that way?

A. Yes; in that way.

Q. How long a time did you spend in determining that?

A. In doing the work I spent all the time since the 2nd day of June. I ran the meander lines around this lake; started from point 11, the original place of beginning; I found the Government marks at the starting point 11; there was a tree there; there is a stump there that has the bearing marks on it; there is no other stump there; there is a rock. I measured this distance from the corner. I think that is the distance marked on the map; it is 233.5; that is the distance.

Q. Do those lines you have made, these straight lines connected by angles, represent the actual survey of the meander lines on the ground?

A. They do.

Q. Did these meander lines, running them exactly in accordance with the field-notes by courses and distances, exactly meet

275 at all points; did they connect together?

A. No; they did not; we corrected it at each place where we came to an original corner, the meander corner; and, also, we connected there, because we knew we were correct.

Q. After running first from meander point 11 around the east end of the lake, following the courses and distances given by the field-notes to meander point 12, did the lines meet there?

A. No, they didn't meet.

Q. How much does it fall short of reaching that meander corner?

A. It falls short eight feet of reaching, and it is 22 feet out of line; that is, it strikes the line 22 feet north of the true meander corner.

Q. Did you find the meander corner?

A. I did not.

Q. Now tell us how you got at this meander corner?

A. We took the proportional distance of the line across the whole section.

Q. Explain that a little more fully; how did you get at that meander corner?

A. Well, on shortage there we make a proportion of the distances; I have not got the figures; suppose it is 20 feet short of the whole distance——

Q. Have you your field-notes and survey notes of the length of the line from the southeast corner of the section to the quarter post, and to the northeast quarter of the section?

A. Yes.

Q. Did you measure the line to see whether it exactly corresponded with the original survey notes?

A. I measured that line in 1888, I think it was, and fixed those points, fixed the 16th corners and quarter corners on that line; there was something on it, the quarter corner was gone, and I had to take the whole line and divide it according to the local subdivisions.

Q. And when you had measured this, how did you find this line; does it overrun or fall short?

A. It falls short; I do not remember how much. In other
276 words, the east line of that section is a little short of what the original survey calls for; the field-notes show the distance from this corner to the meander post, and also the distance from this corner to the northeast corner. In order to arrive at the meander corner 12, which was gone, in order to arrive at its locality, I apportioned the distance, for instance, if the whole distance is 50 feet short we apportion that 50 feet shortage in proportion to the distance between and continue through; at the quarter corner it would be 25 feet; at the 16th corner 12½ feet. I cannot remember how I got at the locality of the meander corner 12, but I can tell you here.

Q. Then you say this meander line coming around the east end of the lake didn't strike the meander corner exactly; now, from there where did you start to go on with that?

A. After we corrected we started at the meander corner.

Q. The corrected corner?

A. The corrected corner.

Q. And running on west on the courses and distances?

A. Yes, sir.

Q. When you got to the next meander corner No. 13, how did you find it there?

A. We found we were off; that shows the line—we corrected the distances on this line, on the center line; there wasn't but a little; that came very nearly something within 20 feet, I think, and the distance here not very much; I think it is here, from here to that point, to the next corner west; a very little difference there. We corrected these courses and distances. We run that line twice; I

don't recollect now how the meander line came out at that corner 13. This shows the east and west end; I can measure it here directly; it is about 62 feet (referring to the map of the Lake Superior Iron Co.); that is, to the corner, and goes about 50 feet south and about 60 feet east of where it should be.

277 Q. In this meander course on the west end of the lake, running nearly south, it goes considerably west of the meander corner?

A. Yes. That line should be further west than it is; if we started here and run back we would have to make that same distance that way, and then you would have to come around like this. The line which I have on the map shows where it runs following the courses and distances; starting at the meander corner, the lines as we laid them on the ground.

Q. At meander corner 14, did the lines meet again?

A. No, they were 62 feet from the meander corner, 62 feet south, or rather at right angles, a distance at right angles on a line from the meander corner 62 feet.

Q. From the original notes you mean?

A. The original notes should meet here. This line shows where they should come to with reference to the meander corner, and drawn to a scale. Going east from there, you take the meander corner and take that line, and when you get to meander corner 16, you find it to have been 56.4 feet I think, or thereabouts. This platting on the map is according to my actual survey. We ran the line exactly according to the original field-notes. I would like to make a statement: I made a mistake in the distance on the line.

Q. On what line?

A. From there up there.

Q. You say you made a mistake in giving the distance from where the shore line crosses the north and south center line north to the north meander line?

A. Yes.

Q. What is the correct distance?

A. Well, it would be about 20 feet more.

Q. Give us the distance?

A. It would be 300 feet.

Q. From the shore line to the meander line on the north side?

A. Yes.

278 Q. You stated the height of this meander line above the shore line was about 60 feet?

A. Yes.

Q. How does the height as you go east from this quarter-section line on the meander line, how does the height of the ground where the meander line goes compare with the height of the original shore line?

A. Well, from this point, or near this point, it was about the same height until you get to that point, until you get to the east end of that north course; I mean the same height from the center line of the section east on the meander line, running on that course, about the same height.

Q. About the same height for something like 600 feet?

A. Until you get to this point, and there it runs down pretty fast. The next angle is all taken out, I can't tell what the original shore was; it has all been dug out.

Q. Do you know where the original outlet of the lake was?

A. Well, I know where it was, but it is all gone; it is changed there: it was the west end. I made some measurements in places on the original shore line.

Q. At the center line, what is the width of the lake north and south, at the center line from the original shore to the original shore?

A. 1,690 feet.

Q. Did you make any other measurements at any other point?

A. Yes, we did; we measured from a point on the shore line on the west side of the lake, to the point near the meander corner 14.

Q. You mean the dotted line, shore line, that blue line?

A. That blue line where it is indicated by a light pencil mark.

Q. What is the measurement across that?

A. That is 905 feet.

Q. Was there any other place?

A. We made one here.

279 Q. Toward the east end of the lake?

A. From that point there down near the end of the second course from the meander corner 12, west from meander corner 12, we measured to the point on the 16th line, but the distance we got across—well, we measured for that distance on the course over there to a monument on *on* the 16th line; we measured 740 feet; that is on the light pencil mark. We made no other over there.

Q. You have drawn a sort of dotted line through the lake, what does that indicate?

Mr. CLARK: I object to the question as incompetent and immaterial until he tells us where it is located, and how he got it, and all about it.

COURT: What is it meant to represent?

A. It is meant to represent half the distance between the—from the point here where we claim we had the shore to the point there where we had the shore.

Mr. BALL: The point on the south side where you had the shore?

A. On the south side of the lake to that point, on that little point on the north side near the west end of the lake where we had the shore; that is where we have scaled it, and put this half way between that scale, referring to the blue line on the north. It is equidistant between those two points, between the meander point and the point over there, meander point 14. That is the point (indicating the north shore of the lake on the blue line on the north shore).

Q. At the shore on the line, as you have drawn it?

A. It is drawn from points equidistant between the shore lines; to points equidistant in all cases, and also to this corner at the east end, from the blue line on the north to the blue line on the south.

I did not draw any line into the south projection of the lake, as I have in the eastern and western, nor any middle line.

280 When I speak of the levels, I speak of the water levels, from the datum I took of the height from the ground. I got these points by getting the water level at these particular points; these points marked where they have been covered up in the water level, the same height as where they are seen on the shore.

Map of the Lake Superior Iron Co. offered in evidence and marked Defendant's Exhibit 2*a*, a copy of which is hereto attached.

(Here follows map marked p. 281.)

282 Q. Have you examined this Exhibit A, this blue print I now show you, so as to compare it with this map?

A. Yes; I did.

Q. Did you fix on this map that you have made the point at the apex in this bed of the lake called by Mr. Clark the equitable center?

A. Yes; I did. It is indicated on this map by these pencil points.

Q. What does this pencil line which appears from that point to the south indicate?

A. That I had produced the line drawn from that point, on the south side.

Q. From meander point 15 north and a little bit east to that central point?

A. Yes.

Q. What is this pencil line drawn southwesterly to meander point 13?

A. The same as theirs; the same as this dotted line of Mr. Clark's.

Q. I show you a photograph, and ask you if you recognize whether it is a part of this lake?

A. That is looking from near that monument, somewhere in the vicinity of that monument.

Q. What monument?

A. From the south side of the lake north of the 16th post; it must have stood somewhere in here; that view was taken from some point in here, north half way across from the center.

Q. What part of the lake?

A. The east end of the lake from the south side of the lake opposite the Cleveland Iron Company's buildings.

Q. The shaft?

A. Yes; the shaft.

Q. Do you recognize this right-hand part of the picture, showing stumps and boulders, etc.; where is that?

A. I know there are stumps there near the west end of this first course east on the north side of lot 7.

Q. What is that dark ground over there?

A. That is the point opposite which we tried to indicate with this rocky point.

Mr. BALL: We offer photograph in evidence as Lake Superior Iron Company's Exhibit 3*a*. (The original of which is to be produced on hearing in the Supreme Court.)

(Here follows blue print marked p. 283.)

284 Q. I show you another photograph, and ask you whether that represents any part of the shore line of that lake and bed?

A. It represents the shore line on this point near the west end of the lake on the north side.

Q. Where you now fix the shore line drawn?

A. Yes; it takes about that part west off there, a little west of that corner. It represents the appearance of the shore line, that rock, exactly. Those buildings in the distance are buildings on the north shore of the land of the Lake Superior Iron Company.

Mr. BALL: I offer this photograph in evidence, as Lake Superior Iron Company's Exhibit 4*a*. (The original of which is to be produced on the hearing in the Supreme Court.)

(Here follows blue print marked p. 285.)

286 This photograph was taken from the point east to the east line of the section; it is east of this point here. That is a high rocky point on the second course going west on the meander line from meander corner 12; this represents a rocky point which is represented there by that blue line, that blue line that continues through. The original shore comes above the base of these rocks; it would come on these rocks.

Mr. BALL: I offer this photograph in evidence as Lake Superior Iron Company's Exhibit 5*a*. (The original of which is to be produced on the hearing in the Supreme Court.)

(Here follows blue print marked p. 287.)

288 Q. I show you another photograph; do you recognize that as a part of the shore line and bed of this lake?

A. Yes, that is the same; that is a distant view of the same point which we had before, showing the stumps; that is Exhibit 3*a*.

Q. Can you state where the shore line is along there, what is it marked by on the picture?

A. There is vegetation along here, that is really what I judge by, the line of vegetation, and also the line of vegetation on the other side.

Mr. BALL: We offer this photograph in evidence as Lake Superior Iron Company's Exhibit 6*a* (the original of which is to be produced on the hearing in the Supreme Court).

(Here follows blue print marked p. 289.)

290 Mr. DUSTIN: In this Exhibit A attached to the bill of complaint, I understood you to say you had examined it; will you state whether it is correct or not?

Mr. CLARK: I object to the question as incompetent and immaterial.

A. I couldn't do that, because I have not examined it sufficiently; I have only scaled the distance that it gives here to that point.

Q. To the apex of the dotted line?

A. On a different scale, but I have scaled it, and laid it on this, that is all I have done.

—. But the meander lines around the lake, as given in the field-notes, were not correct?

Mr. CLARK: I object — that as incompetent.

A. I wouldn't say that, I don't know.

Q. They don't correspond with the lines run according to the courses and distances given?

A. No.

Q. Have you examined the map that is on the frame here, prepared by Mr. Jopling?

A. Somewhat, yes, sir.

Q. Will you state whether that is correct or not?

Mr. CLARK: I object to the question as incompetent and immaterial; he has not given reasons for giving an opinion.

A. No, I couldn't tell whether the lines in the lake, the meander lines are on there correct or not; I have not examined it.

Mr. BALL: You say you have examined that map?

A. I have not made such an examination—I have examined the position of the corners, the meander corners, the subdivision corners, the 16th corner on the south side, and meander corners on the south side, and find them to be correctly put on; the distances are correct, and angles from these distances are correct.

291 Q. Have you examined the meander lines to see about those?

A. No, I have not.

Q. You notice on that map that the meander lines all meet at the corners; now in drawing the map, would you draw it so as to make the meander corners meet?

A. Yes, sir.

—. How would you do it?

A. I would take the actual distances and angles on the ground, as the survey was made, as it has been surveyed, as it has been determined by actual survey.

Q. How do you make those meander lines meet?

A. I apportion the distances on these meander lines according to the distances on the section lines opposite to them.

Q. As corrected?

A. Yes, sir.

Q. And that is the way it is done?

A. Yes.

Mr. BALL: That is, averaging the errors?

A. Well, yes—it is not averaging the errors, except in distances; we have ascertained by calculations that they would meet, or meet approximately, within a very few feet, but we have to take the proportional distances the same as I explained in regard to placing the meander corners on the east line of the section.

Q. Did you get at all these meander corners that are not marked in the same manner you spoke of, averaging the distances?

A. Yes, sir.

Q. Does the length of this line on this south line of section 10 from the southwest quarter, the quarter post, correspond with the Government survey?

A. It does not.

Q. Is it long or short?

A. It is short.

Q. You got at the exact distance and located the corners in the way you have described?

A. Yes, sir.

Mr. HAYDEN: Mr. Cummings, did you go over this map
292 in front of you, the large map, with Mr. Jopling to know how he determined his shore line?

A. No. I didn't.

Q. You didn't do that?

A. No, I only examined the Government corners and distances, and the actual distances which we had where the Government corners are.

Q. Did you not compare your notes that you had taken with reference to the shore line, about which you have been testifying, to a certain extent with the shore line of this?

A. No, not to compare it.

Q. It is true, too, that the shore line there on your map wasn't correct, is it not?

A. Certainly, that shore line on the south shore is the shore line taken after the whole of that fractional portion had been filled in, and more too; this is the actual shore line at some recent date; this is the shore line 50 years ago; they made the meanders in 1846.

Cross-examination by Mr. CLARK:

Q. You say there had been changes in mining and work around the lake that would make the shore line upon the map they have referred to, this large map on this frame, different from the one that was applied, or that would be applied from the meander courses and distances of the Government surveyors?

A. I say so, because I see it, perfectly plain.

Q. That map is not accurate, according to the survey made by the Government surveyors, as shown by the field-notes?

A. Of course not.

Q. Now this platting you have here of the courses and distances on your map is the one you put on as your actual survey?

A. Yes, sir.

293 Q. And not from the notes which are given independent of the survey but your own survey?

A. My own survey; my survey, taking the field-notes.

Q. Did you measure the distance from the corner, the southeast corner of section 10 over to the meander trees at post 11?

A. On the meander corner I did; I found that distance to be 223.5 feet.

Q. What do the field-notes show it to be, the field-notes of the Government, if you remember?

A. 131, I think, or 134.

Q. You would not be sure about that?

Mr. BALL: They are in evidence.

Mr. CLARK: Yes, they are in evidence.

Q. Did you measure the distance from this southeast corner of 10 over to post 12, as you made it on your survey, and as mapped on your map?

A. Yes, sir.

Q. What did you make that distance?

A. That distance from the—that is not a continuous distance, but taken from this corner 11 to corner 12 it is 526.5 feet. I don't remember what the field-notes show.

Q. Take the distance from the southeast corner of this section 10 to the northeast corner—you say there was a shortage on that line of the section?

A. Yes, sir; I can give it by reference to my notes at home; I will bring them after dinner and give you the shortage.

Q. In platting this map as you have platted it from your survey, you located this meander corner 11 by correcting and dividing up what you found to be a shortage on that line, in fixing that post, did you not?

A. No, sir.

Q. Didn't you make any correction whatever from the actual measurement, from the southeast corner to post 11?

A. I made an actual measurement myself from the southeast corner to the corner marked 11.

294 Q. Did you make any correction whatever on account of the shortage of that line in locating it on the map as you platted it?

A. No. I located that the exact distance, because it is measured on the ground.

Q. What do you say as to meander corner 12, whether you made any correction in that on account of that shortage?

A. I did.

Q. On account of that shortage; how much did you move that post in platting it on account of that shortage?

A. I can tell you when I get those notes, to figure.

Q. So that you changed the courses and distances in making this

plat, and moved meander corner 11 by making the corrections on account of the shortage on this east line of section 10?

A. Yes.

Q. It would affect the entire plat around the entire lake, wouldn't it, by the change of location on 12?

Mr. BALL: He has not said that he changed the location of 12 at all; he didn't find 12 at all.

Mr. CLARK: I object to instructions and interruptions.

Mr. BALL: I don't like to have you mislead and deceive.

Mr. CLARK: I deny your assertion; it is perfectly plain on the record.

Q. I ask you, as an engineer, not as a lawyer, whether commencing at the post 11, meander post, and going around to 12, if you shifted the location in order to correspond with the shortage in the line, whether it wouldn't change the courses and distances from that on, from what they would be if you hadn't changed the point as fixed.

A. I am perfectly willing to answer that; I don't suppose it would occur—it couldn't occur.

295 Q. It would be liable to produce the variations you have referred to on the south line when you came to close in?

A. That I couldn't tell you.

Q. But it would make a variation of the courses and distances after you left this meander corner 11?

A. Yes.

Q. This blue line in the east end of this lake, as you have it mapped, is according to your idea of the shore line and not according to the actual notes as you run them from the meander line?

A. I don't understand you.

Q. This blue line you have here east of the line of section 10 is your idea from an examination and recollection what the actual water line was, but not as given by the courses and distances of the Government?

A. Those were ascertained by my actual measurements and offsets from these lines which were made beyond two points, on the shore, where the changes were made.

Q. When did you make those offsets you speak of?

A. Last week and this week.

Q. The lake has been pumped out how many years?

A. I don't know exactly.

Q. Vegetation would grow along there, wouldn't it, if it was pumped out, in three or four years, so it would not be easy to determine just where the water was 40 years ago?

A. There is no vegetation now growing and living on that line, or anywhere near it.

Q. On what line do you mean?

A. On the line as I marked the shore line, on this blue line.

Q. Do you know whether that lake had been lowered at any time?

A. Yes.

Q. Before it was pumped out?

A. Yes, sir; well before it was drained it was lowered.

Q. What year was it lowered first?

A. It was done by pumping for the supply for the city of Ishpeming.

296 Q. When was that done, how was it lowered?

A. I can't give you the dates.

Q. About what time, as near as you can recollect it, your best recollection?

A. Well, I don't know; I should think probably about ten years ago, somewhere in the vicinity of that.

Q. How was it lowered, by digging out the outflow?

A. Lowered by pumping the water for the supply for the city of Ishpeming.

Q. Was there any lowering of the outlet?

A. I do not know, sir.

Q. Taking this line you marked as the middle line of the lake, and lying east of the center line of 10, you say the dotted line as appears upon Exhibit A of the bill, and appears on the north line, and your line, this point here, on the north line of the dotted line to the equitable center, as referred to and appearing upon Exhibit A of the bill of complaint, is just in the line you have marked in the center, or apex, this line referred to that Mr. Ball asked you about?

A. Do you want me to say whether this line running from the equitable center, as shown by that line, to that, is north or south of the center?

Q. No; does it terminate in your line as you have platted it? Does it meet your line?

A. Does what terminate in that line?

Q. Does that dotted line as you have platted it, and as you take it from Exhibit A, as you told Mr. Ball?

A. Yes, the line taken from the Exhibit A terminates at the point where this line terminates on this line, on my line.

Q. Did you measure, or can you measure with your scale now and show what distance it does terminate in that line east of the center line of 10, according to your map, at right angles to the center line of 10?

A. About 130 feet, by scale.

297 Q. How did you say you arrived at that center line lying east of the center line of 10?

A. This center line?

Q. Yes, referring to the center line of 10.

A. Connecting the points equidistant from each shore on the center line of 10, and the points equidistant from each shore which we run here, and measured at this point.

Q. To which you have referred before and marked on this map?

A. And marked on this map.

Q. And also equidistant between the south line and north line of the lake, as appears upon the east of the center line of 10?

A. Yes, sir.

Q. Then you drew a straight line, did you, from the last-named point to the point, the center of the east *east* line of 10?

A. Yes, connecting those two centers by straight lines.

Q. In getting your starting point on the center line of 10 equidistant between the south line and north line, you took your own blue line, or actual line of the north line of the water, and not the meander line?

A. I took my blue line as the line of the original shore line.

Q. Who directed you to do that; to get at this equitable position of things?

A. We didn't call it an equitable center or anything.

Q. Who told you to fix that line, to locate that line in that way?

A. The lawyers, Ball & Ball.

Q. And these lines you run to the west of the center line of 10 where we have three different courses, dotted lines, you ran that in the same way by cross-measurement as you have stated?

A. Yes, this is an actual measurement, and this is scaled on the map, from the blue line to the north, and from the blue line on the south as I have platted it on the map. This entire map, as
298 far as courses and distances are concerned, outside of the section lines as platted here as a line which I platted from my own running of the Government courses and distances, as shown by the Government meanderings and the line known as the blue line, it is according to my idea and recollection of the original shore line forty years ago; and the vegetation on the north of the lake as it grew forty years ago, is what controls this blue line on the north; we take the line which is shown by the roots of stumps and trees and small trees on that line.

Q. Haven't you seen forests grown up from shrubs in the last 40 years?

A. I have seen trees grow up in forty years, yes, sir; heavy trees from shrubs.

It was not all low land at what is known as the east end of the lake; it begins to spread out west of the east line of 10; it was not low land on the north of the lake. It was low land east of the center line of 10 on section 11, a very short distance, and then it rises. Where I ran my meander line on 10 from the east end as I have platted it, it was all high land, except about 200 feet at the eastern end, and that was on low land, sloped down, in my judgment, 40 feet high there, down to the location of my blue line, on the north of the meander line, that is, from the point 40 feet higher than the original shore line of the lake; it slopes nearly down to the location of this blue line. Well, at this point there is something like 10 feet, at meander corner 12; I should judge it was about 10 feet level before it began to rise.

Q. Would that be so, east of the meander corner 12 clear around to the end of this plat, that distance?

A. Well, it would pretty near, probably it might vary in width. There is a little bench along the shore that I didn't take particular notice of, but I should think it was about the same all the
299 way until you get near the end here; this down here is low land, or near the line at the east end going from the north-

east corner. The low land extends back from my dotted line about fifty odd feet; I mean the lake shore, not the blue line; I mean the meander line.

Q. What I want to get at is, how far back from the east end of this lake the low land from your blue line runs north? About how far?

A. I should think about 200 feet; it is nearly level from the west end on the north side, toward meander corner 12.

Q. Referring to the center line of section 10 and the blue line, the distance between the blue line and the meander corner—meander line as you have platted it—how soon does the land rise from your blue line, what distance before it rises up?

A. Well, in going 20 feet it is 10 feet higher; then it is very nearly level for about 100 feet.

Q. In going five feet, how much?

A. Going five feet, I should judge, it would rise about five feet. I couldn't tell whether I measured it or not, because I didn't get the exact point which I was looking for—that is, the exact height, the exact point of the level of the original lake shore.

Q. You say you made your estimates or elevations by levels; what did you take as your starting point, your bench from which to commence your levels?

A. I took the water mark on this—as near as I could get at it—on this line at the west end of the lake on the north side.

Q. What is the course and distance at that point on the meander line?

A. South 80 deg. west 10.50 chains. That would be about 800 feet from the outlet of the lake.

Q. And then you undertook to establish the balance of the
300 original shore line lying for half a mile or more to the east by that bench as thus established, did you?

A. Before establishing the line from that bench, I leveled from that bench over to the point here.

Q. When you say point here, you mean——

A. Near the east end of the lake and particularly at that point west of meander corner 12, on the second course, or meander line, where I found the same conditions that were at my starting point.

Q. What did you find those to be, please state that.

A. I found I was about the same distance from the roots of the old growth, the distance below the roots of the old growth, around the whole east end where it could be seen, where it has not caved in; the old growth of timber, brush and bushes.

Q. Do you mean to say you could tell what were the roots of trees 40 years ago at that point?

A. Yes, sir.

Q. And what were not?

A. Yes, sir.

Q. Is it based upon that idea that you now fix the level there at this east end, the level of the water?

A. Yes, sir.

Q. All the same level?

COURT: I understand he leveled across?

A. Yes.

Q. But down there to the west, as you refer to, the bench, and leveling across, and the roots, those are the two control-ing evidences——

A. There are water marks you can see, but you can't distinguish so closely as you can by the growth that is there; you can tell within a few inches where the water has been many years ago, a growth of old stumps, trees and bushes. This blue line is simply my judgment, as I have already stated, as to the shore line.

Q. What is the character of the land lying at the furthest point of the east point of the lake, whether low or high?

301 A. It is pretty nearly level; it is low land; but there are large stumps within a few feet of the blue line, at the extreme east end of the lake.

Q. Have you made a plat of the courses and distances from the Government meander notes without using your own surveys; you say you can't plat and inclose that lake by these courses and distances?

A. Not continuously.

Mr. BALL: I want to clear up one or two things. In fixing a meander corner where it has become obliterated, No. 12 for instance, do I understand you that you moved the meander post, or placed it in a different place from where it was originally?

A. No, I supposed I put it where it was originally.

Q. In what way made a proportion that you speak of?

A. I made an equitable distance or proportion of the land, an equitable division.

Q. When you found there was an error in the length of the line, on what theory did you divide the error in that way and apportion it between the different parts?

A. We simply made a proportion on the theory that they made their errors continuously, they were not made at one point; if we knew they made an error at one point, it wouldn't apply on the rest of the line. My theory is, the error is continuous.

Q. You located it then, you said at 11, you found that?

A. Yes, sir.

Q. We are certain of one thing, that 12 is still on the section line?

A. Yes, sir.

Q. East and west?

A. Yes.

Q. You didn't get off there?

A. No.

Q. You put it on the section line?

A. Yes.

Q. When you speak of this error, you say it is placed along the line—you refer to the original survey?

A. Yes, sir.

Q. And the object of proportioning that is to place it as

302 near as possible where it was in the original survey?

A. Yes, sir.

Q. And then run the survey on from that?

A. Yes, sir.

Mr. DUSTIN: What is the fact, are the section lines run correctly north and south and east and west around the lake; are they direct north and south?

A. No.

Q. Nor east and west?

A. No, sir.

Q. How much are they out of line, do you know, about?

A. Yes, I know exactly.

Q. Tell about how much?

A. That line is off——

COURT: That line is section 10?

A. That is off from the true meridian 1 degree 2 minutes and 33 seconds.

Q. How is the south line?

A. The south line run from the southeast corner to the quarter corner on the south side, I have not figured it exactly; it is a little south; it is about half a degree.

MR. BALL: South of west?

A. South of west; from the quarter corner on the south side to the west is off between two and three degrees, about two degrees and a half, I think; two degrees and 38 minutes, I think it is.

Q. Bearing north of east?

A. Yes.

Mr. CLARK: I understand you used the same rule adopted in correcting the section line between corners, and correcting this location of post 12?

A. Yes, sir; certainly.

Defendant, Lake Superior Iron Co., rests.

Mr. HAYDEN (on behalf of Cleveland Iron Mining Co.): We offer in evidence a letter of the Lake Angeline Company, dated March 2, 1892, signed by Thomas Walters, superintendent.

303 COURT: Those have all been referred to.

Mr. HAYDEN: They have been identified, yes, sir; and the accompanying letter of March 2, 1892.

Mr. CLARK: We object to them as immaterial and incompetent.

Letters received in evidence and marked Cleveland Iron Mining Company's Exhibits 2 and 3, and are as follows:

DEFENDANT'S EXHIBIT 2.

ISHPEMING, MICH., *March 2nd*, 1892.

F. P. Mills, Esq.

DEAR SIR: Enclosed herewith find two copies of agreement. Will you kindly sign and return one, and oblige,

THOS. WALTERS.

DEFENDANT'S EXHIBIT 3.

ISHPEMING, MICH., *March 2nd*, 1892.

Cleveland Iron Mining Co., Ishpeming, Mich.

GENTLEMEN: Providing you close by March 15th, 1892, a contract with B. C. Howell, to drain Lake Angeline for $33,000 in full, and only on completion of the work, we will pay you one-fifth ($\frac{1}{5}$) of such cost, less one-fifth ($\frac{1}{5}$) the then estimated value of such plant as becomes yours at that time.

We also, by reason of not entering into a joint contract to keep the lake bed empty, agree that we will construct a flume to
304 take away all drainage from our side of the section line, and maintain it until the ore on such land, situated under the lake bed, is exhausted. After that you may take the flume without charge, and care for it as you see proper.

Yours truly, PITTSBURGH & LAKE ANGELINE IRON COMPANY,
By THOS. WALTERS, *Supt.*

Conditions accepted.
CLEVELAND IRON MINING COMPANY,
By F. P. MILLS, *Ag't.*

Mr. HAYDEN: We offer in evidence the contract, dated the 7th day of March, 1892, between B. T. Howell of the city of New York and the Cleveland Iron Mining Company, for pumping Lake Angeline.

Received in evidence, and marked Exhibit 4, and appears upon page 309 of this bill.

Mr. HAYDEN: I offer in evidence a certificate, dated Ishpeming, Michigan, Dec. 24, 1892; and a telegram signed by C. H. Hall and J. S. Fay, Jr.; these three certificates signed by the three several companies, by their respective officers, that the contract by Howell for pumping has been performed.

Mr. CLARK: We object to them as immaterial and incompetent.

Papers received in evidence and marked Exhibits 5, 6, 7 and 8, and are as follows:

305 DEFENDANT'S EXHIBIT 5.

ISHPEMING, MICH., *Dec.* 24, 1892.

It is hereby agreed between the undersigned that Lake Angeline is practically completely drained of water by the contractor, Howell, under his contract so to do.

F. P. MILLS, *Agent C. I. M. Co.*
PITTSBURGH & LAKE ANGELINE IRON COMPANY,
By THOS. WALTERS, *Supt.*

DEFENDANT'S EXHIBIT 7.

ISHPEMING, *Dec.* 22, 1892.

To J. S. Fay, Jr., Tr., Boston, Mass.:

Howell's contract is practically completed, but his flume is useless for continued use as contract requires, and a new one must be constructed at considerable expense. Howell disclaims responsibility for flume, and makes an additional claim beyond contract of $3,000 for having been deceived as to character of lake bottom, which Hayden says might go to a jury. Howell offers to relinquish this and pay $1,300 toward new flume for an immediate settlement, which Hayden strongly advises us to accept. Shall we do so?

C. H. HALL, *Ag't.*

DEFENDANT'S EXHIBIT 8.

BOSTON, MASS., *Dec.* 23*d*, 1892.

To C. H. Hall, Ishpeming, Michigan.:

Let the Cleveland settle with Howell and keep out of the fight.

J. S. FAY, JR.

306 Mr. HAYDEN: I offer in evidence a certificate signed by B. C. Howell, the Cleveland Iron Company, by William G. Mather, president, certifying substantially to the same thing, and to payments and settlement, showing that the pumping is paid for.

Mr. CLARK: We object to that as incompetent and immaterial.

Paper received in evidence and marked Exhibit 9, and is as follows:

DEFENDANT'S EXHIBIT 9.

This supplementary agreement of settlement, made by and between B. C. Howell and the Cleveland Iron Mining Company, witnesseth:

That, whereas, the said parties to this agreement entered into a contract for the pumping and draining of Lake Angeline, dated March 7th, 1892, which is hereby referred to and made a part hereof, and on the 24th day of December, 1892, entered into a further contract of settlement of the contract made March 7th, 1892; and,

Whereas, the parties hereto, in accordance with the terms of the said last-named contract, have prepared and agreed to an account, which is hereto attached and made a part hereof, signed between them, and the basis of the settlement agreed upon under the contract made December 24th, 1892.

Now, it is mutually agreed by and between the parties hereto as follows:

(1.) That the Cleveland Iron Mining Company shall pay by check to Thomas Boggess, Jr., trustee, the sum of two thousand five
307 hundred and eighty-five dollars and eighty-four cents ($2,585.84), shown on the account of settlement hereto at-

tached to be now due, and after the settlement of the claims mentioned in said account, which the said Howell receives in full settlement of all claims under said contract, both on his own part, and on the part of anybody else, except as hereinafter stated.

(2.) And the said Cleveland Iron Mining Company, after paying the claims mentioned in said account, the money for which it has retained, shall account to and pay over to the said Boggess, Jr., trustee, any residue, if any, remaining after such payment is made and all pending suits are settled, and costs and expenses paid.

B. C. HOWELL.
CLEVELAND IRON MINING CO.,
By WM. G. MATHER, *Pres.*

GEO. P. CUMMINGS, recalled by Mr. Clark for further cross-examination, testified as follows:

Since dinner, I have looked to see what was the shortage of the east line of 10 as referred to; the whole distance is 5,146 feet, and it should be 5,280 feet on the east line, that is, the east line of section 10, a shortage of 134 feet on the line.

Q. In locating the quarter post on that line, you say that you divided up this shortage, shortening each line from the quarter post each way north and south?

A. I simply divided the whole distance.

Q. And located the quarter post at that point?

A. Yes, sir, that is the way it was done.

Q. In fixing this meander corner 12, which way was it moved?

308 A. The Government distance, if it was full, would be 539.88 chains; the present distance is 526.05 chains between these meander corners.

Q. I wish to ask you one further question: In laying this course and distance, north 80 deg. west 6 chains, which line, the one marked true meridian or the other one alongside, did you use as the base for laying off that angle?

A. I used the meridian for laying off the angle.

Q. The one marked true meridian?

A. Yes, sir; there is one thing I wish to modify, the answer which I gave, and change it, in regard to getting a true proportional which would connect at the southwest corner for that meander line; I have looked the thing up, and find I am not ready to say that I could do it.

Q. What is the variation of the needle from the true meridian now?

A. Well, that depends on where you are; I suppose about three degrees.

Q. At the present time?

A. Yes.

Q. What variation did you figure in running that meridian?

A. I didn't use the needle at all.

PATRICK F. SMALL, sworn as a witness on the part of the Cleveland Iron Mining Company, testified as follows:

Direct examination by Mr. HAYDEN:

I am the recorder of the city of Ishpeming, and as such have charge of the books, papers and records of the meetings of the common council in the city of Ishpeming, as clerk of the city.

309 Q. I show you a paper which you have brought to me entitled An ordinance granting permission to the Cleveland Iron Mining Co, the Lake Superior Iron Co., and the Pittsburgh & Lake Angeline Iron Co. to pump out and permanently drain Lake Angeline, and ask you where you found that paper?

A. I found it in the recorder's office in Ishpeming.

Q. Among the papers belonging to the city, the city papers?

A. Yes, sir.

Mr. HAYDEN: I desire to introduce this in evidence.

Mr. CLARK: We object to it as incompetent and immaterial.

Paper received in evidence and marked Exhibit 10, and is as follows: This petition is embodied in the ordinance introduced as Exhibit 11, the original signatures to the petition having been admitted by the several parties.

Said ordinance here offered and marked as Exhibit 10 was again offered by Mr. Hayden as Exhibit 11, and follows below.

The signature of Captain Walters to the ordinance is admitted by complainant's counsel, signed by him as officer of complainant.

Mr. HANCHETT: Are the two last signatures admitted by the complainant?

Mr. CLARK: We admit that is the signature of Mr. Mills, and of Mr. Hall also.

Mr. HAYDEN: I now offer in evidence a certified copy of the proceedings of the common council of Ishpeming of March 16, 1892.

Mr. CLARK: We object to that as incompetent and immaterial.

Received in evidence and marked Exhibit 11, and is as follows:

310 DEFENDANT'S EXHIBIT 11.

MARCH 16TH, 1892.

A regular meeting of the common council of the city of Ishpeming, Michigan, held in the council chamber on Wednesday evening, March 16th, A. D. 1892.

Meeting called to order at 7.30 p. m. by Mayor Donahoe.

There were present Mayor Donahoe, Aldermen Routhier, Eggan, Johnston, Jones, Fitzpatrick, McNamara, Samuelson, Beerling, Swanson, Persons and Buzzo. Absent—Aldermen Malloy and Anderson.

Alderman Jones introduced the following ordinance:

An ordinance granting permission to the Cleveland Iron Mining Company, the Lake Superior Iron Company, and the Pittsburgh & Lake Angeline Iron Company to pump out and permanently drain Lake Angeline.

Whereas, the Cleveland Iron Mining Company, the Lake Superior Iron Company, and the Pittsburgh & Lake Angeline Iron Company, by mesne conveyances from the original patentees of the United States, severally own all the land surrounding Lake Angeline, which said lake is situated within the corporate limits of the city of Ishpeming, and therefore, exclusively severally own the bed of said lake, as follows, to wit: The said The Cleveland Iron Mining Company all that portion of the bed of said lake lying east of the center line of section ten (10), as projected through said lake, and north of the south lines of section ten (10) and section eleven (11), township forty-seven (47) north of range twenty-seven (27)
311 west, as so projected; the Lake Superior Iron Company all that portion of the bed of said lake lying west of the center line of said section ten (10) and north of the south line of said section ten (10), as projected through said lake; the Pittsburgh & Lake Angeline Iron Company all that portion of the bed of said lake lying south of the south line of said section ten (10), as projected through said lake, and the surface right of lot 6 of said section 10, as acquired by them from the Lake Superior Iron Company.

And whereas, the said three companies desire to pump the water out of said lake, and to permanently drain the same, in order to severally conduct mining operations on the respective portions of said lake bed belonging to each, and desire the formal permission and authority of the common council of the city of Ishpeming so to do, said lake lying and being within the corporate limits of said city;

Therefore, be it ordained, by the common council of the city of Ishpeming.

SECTION FIRST. That consent, permission and authority are hereby given and granted and duly vested in the said The Cleveland Iron Mining Company, the said The Lake Superior Iron Company, the said The Pittsburgh & Lake Angeline Iron Company and their respective successors and assigns, to pump out and drain away the water of the said Lake Angeline and, thereafter, to permanently drain the same and to maintain and operate the necessary machinery and pumping apparatus and appliances so to do, provided that the water pumped out of said lake and permanently drained therefrom shall be carried away through the present outlet of said lake into Carp river.

SECTION SECOND. This ordinance shall take effect from and after the passage thereof.

312 SECTION THIRD. All ordinances or parts of ordinances or resolutions heretofore made or ordained or passed, which are inconsistent with the provisions of this ordinance, are hereby repealed.

Approved by the common council of the city of Ishpeming on March 16th, 1892. T. F. DONAHOE, *Mayor.*

Attest: A. SANDBERG, *Recorder.*

MARCH 16TH, 1892.

To his honor the mayor and the common council of the city of Ishpeming, Mich.:

We do ask your honorable body to pass favorably the above ordinance.

CLEVELAND IRON MINING CO.,
By F. P. MILLS, *Ag't*
LAKE SUPERIOR IRON CO.,
By C. H. HALL, *Ag't.*
P. & L. A. I. CO.
THOS. WALTERS, *Supt.*

Alderman Routhier moved the adoption of the foregoing ordinance. Supported by Alderman Eggan, the vote by yeas and nays were as follows:

Yeas—Mayor Donahoe, Aldermen Routhier, Eggan, Johnston, Jones, Fitzpatrick, McNamara, Samuelson, Beerling, Swanson, Persons and Buzzo.

Nays—None.

The motion was then declared unanimously carried.

A. SANDBERG, *Recorder.*

STATE OF MICHIGAN, } ss:
County of Marquette, }

313 I, Patrick Small, recorder of the city of Ishpeming, Marquette county, Michigan, certify that the foregoing is a true, correct, and compared copy, compared by me, of the original record of minutes of meeting of the common council of said city held on the date therein set forth, relating to the petition therein set forth, and of the whole thereof, and that said original record is in my possession as such recorder.

Dated June 19th, 1897.

P. F. SMALL,
[SEAL.] *City Recorder.*

Mr. HAYDEN: I wish to put in evidence what I did not read in the original, the indorsement of P. F. Donahue, mayor; will you admit the signature of Mr. Donahue, Mr. Clark.

Mr. CLARK: I think that is the signature of Mr. Donahue.

Mr. HAYDEN: Will the gentlemen admit that this letter of August 18, 1893, is the letter of Mr. Laughlin to the Cleveland Company, or its president?

Mr. CLARK: We admit the signature of Mr. Laughlin, but we make the objection that you haven't the entire correspondence, and therefore the letter is incompetent.

Mr. HAYDEN: I introduce the letter in evidence, dated August 18, 1893.

Received in evidence and marked Exhibit 12, and is as follows:

DEFENDANT'S EXHIBIT 12.

CLEVELAND, OHIO, PGH., *August* 18, 1893.

W. G. Mather, Esq., trustee, Cleveland, O.

314 DEAR SIR: Replying to your favor of the 1st inst., I would say that we have had a meeting of our executive committee, and again fully considered your claim pertaining to a continued liability under the agreement for the drainage of Lake Angeline and being advised that we have fully complied with our requirements under the contract, the committee were of the unanimous opinion that there is nothing to arbitrate. Granting for the sake of argument that the new flume was a necessity and we are liable for our share of $\frac{3}{5}$, the figures will show that by its entering our flume at the point it does, we have already contributed our share of the cost, and you cannot but admit that under no circumstances were we interested in pumping the mud out of the bottom of the lake; and had such a contingency been stated in the contract, we would not have become a party to it; and we trust that you will conclude, in equity, the position we have taken is correct.

Yours truly, JAS. LAUGHLIN, JR., *President.*

Mr. HAYDEN: The next document is the correspondence regarding the trespass of 1893, with a map attached, the map attached to this correspondence, and the letter of Mr. Kidder of November 2, 1893, and of November 6, 1893, heretofore identified, are offered in evidence, together with the replies of Mr. Mills for the Cleveland Company.

Mr. CLARK: We object to it as incompetent and immaterial; as to Mr. Mills' reply, this is a copy that we don't know anything about; we object to Mr. Kidder's letter because it is a part of the correspondence, and the whole correspondence should be produced.

Mr. HAYDEN: I offer in evidence Mr. Kidder's letter of
315 November 6, 1893, for the purpose of showing that the trespass was settled.

Papers received and marked Exhibits 13, 14 and 15, and are as follows:

DEFENDANT'S EXHIBIT 13.

ISHPEMING, MICH., *Nov.* 2, 1893.

Mr. F. P. Mills, Ishpeming, Mich.

DEAR SIR: I regret to have to inform you that we have inadvertently crossed the line near our lake shaft on the first level, and at a point 89′ below the lake level, and a little over (200) two hundred feet west and north of our lake shaft-house, driven through ore on your side of the line, for a distance of (91′) ninety-one feet. The size of the drift or heading did not exceed 8′ x 8′, and I estimate that we took of your ore about 554 tons, five hundred and

fifty-four tons. We shall be glad to settle for this trespass in any way you may prefer.

Very truly yours, A. KIDDER, *Ag't.*

DEFENDANT'S EXHIBIT 14.

ISHPEMING, MICH., *Nov.* 6, 1893.

Mr. F. P. Mills, ag't, Cleveland I. M. Co.

DEAR SIR: I have your favor of Nov. 3rd. I have to say that your proposition therein contained for the settlement of the trespass is entirely satisfactory to this company.

Very truly yours, A. KIDDER, *Ag't.*

Exhibit 15 map hereto attached.

316 Mr. HAYDEN: I offer the letter now identified by Mr. Kidder of January 22, 1894, two letters, and April 6, 1894, signed A. Kidder, agent; a letter-press copy attached here of March 26, 1894, letter of F. P. Mills; and the reply of Mr. Kidder April 26, 1894.

Papers received in evidence and marked Exhibits 16, 17 and 18, and are as follows:

DEFENDANT'S EXHIBIT 16.

ISHPEMING, MICH., *Jan. 22nd,* 1894.

Mr. Frank P. Mills, ag't, Ishpeming, Mich.

DEAR SIR: I return the copy of agreement as to use by the Lake Angeline I. Co. of the surface of part of the south half of S. E. ¼ of sec. 10–47–27.

We are under great obligations to you for the privilege granted us by the above-mentioned instrument. While your property is owned and managed by the present stockholders, we can rest secure that every reasonable consideration will be shown us in the granting of special time for the removal of stock piles, etc., after notice to quit has been served.

We should consider it a great favor if you could change the two terms of six mos. and three mos. to twelve mos. and six mos., respectively, in the instrument above referred to.

Very truly yours, A. KIDDER, *Ag't.*

DEFENDANT'S EXHIBIT 17.

MARCH 26, 1894.

A. Kidder, Esq., agent P. & L. A. I. Co., Marquette, Mich.

317 DEAR SIR: Herewith please find leases in triplicate of some land used by you at your east end mine for stock-pile purposes. We have changed the time as you wished, but to fully protect us we have had provision made so that if we should pull in any of this ground that we own but give you the use of free, we are not to be held for it in any way. This seems reasonable to us and proper.

We have started a drift towards your mine, but have 650 feet to drive, and it will take us about a year to get there.

Yours truly, F. P. MILLS, *Ag't.*

P. S.—After the execution of these leases please send one copy to Mr. W. G. Mather, pres., Cleveland, Ohio, one copy to us here and retain the remaining one.

F. P. M.

DEFENDANT'S EXHIBIT 18.

ISHPEMING, MICH., *Apr. 6th*, 1894.

Mr. F. P. Mills, ag't Iron Cliffs Co., Ishpeming, Mich.

DEAR SIR: I have your favor of the 26th inst. enclosing leases in triplicate. As soon as our president, Mr. Laughlin, returns to Pittsburgh from the South, he will execute the copies for your Cleveland and Ishpeming offices;

In the meantime, please accept our thanks for your kindness in the matter of land leased.

Very truly yours, A. KIDDER, *Ag't.*

318 MR. HAYDEN: I also offer another letter of the same date, same heading, to F. P. Mills, signed by Mr. Kidder, agent.

Received in evidence and marked Exhibit 19, and is as follows:

DEFENDANT'S EXHIBIT 19.

ISHPEMING, MICH., *Apr. 6th*, 1894.

Mr. F. P. Mills, ag't Cleveland Iron Company, Ishpeming, Mich.

DEAR SIR: I have your favor of the 26th inst., and enclosures as stated. The provision as to possible caving of ground leased, is certainly perfectly reasonable and fair, and we are under great obligation to you for the favor granted us.

Thanking you for your kindness in this matter, we remain,

Very truly yours,

PITTSBURGH & LAKE ANGELINE I. COMPANY,
By A. KIDDER, *Ag't.*

MR. CLARK: I call your attention on the record to this lease, as an unexecuted lease; it never was executed.

MR. HAYDEN: That went in yesterday against your protest.

MR. CLARK: We object to reading it as incompetent; the contents of a lease between the parties, which has never been executed.

MR. HAYDEN: I offer in evidence the letter of January 30,
319 1896, identified by Mr. Kidder as having been received from Mr. Mills, and the map I also wish marked attached to that same letter.

MR. CLARK: We object to it as incompetent and immaterial.

Papers received in evidence and marked Exhibits 20 and 21. The map is hereto attached. Letter is as follows:

DEFENDANT'S EXHIBIT 20.

ISHPEMING, MICH., *Jan'y* 30, 1896.

A. Kidder, Esq., P. & L. A. I. Co.

DEAR SIR: We are sorry to say that our company have trespassed on your company at your east end mine, as the attached maps will show. This has occurred on our 220-ft. sub level, and for three full sets, and four partial sets, have carried the stope five tiers high. I did not know this until very lately. The four sets and two partial sets, one set high only, which were driven across the line on this same sub-level, some time since and before complete survey was made, we knew about, as both your surveyor Mr. Bradt, and our men, Mr. Parnell and Mr. Jopling, checked up on this, and put in permanent points indicating the line. I regret to find that since that time this additional trespass has been made. The total trespass on this 220 ft. sub. is 9,525 cubic feet, which we hereby give you credit for on a final summing up of trespass that will no doubt occur on either party as time goes on.

Yours truly, F. P. MILLS, *Ag't.*

320 D. H. BACON, produced as a witness on the part of the Cleveland Iron Mining Company, testified as follows:

Direct examination by Mr. HOYT:

I reside at Towar, Minn. Am president of the Minnesota Iron Company. I entered the service of the Cleveland Iron Mining Company on February 8th, as superintendent, and retained that position until Mr. Morse retired; Mr. Morse had been the agent, which I think was in 1883 or 1884; upon his retiring, I took his duties and held the position as agent until I left the employ of the company in 1887. As superintendent and agent, my duties were to take charge of the work underground and above, and added to them the general business of the company as carried on in that county. I had to do with the real estate, fixing its boundaries. I acquainted myself with the property owned by the company while I was superintendent.

Mr. CLARK: I object to the question as incompetent; the best evidence of power with reference to real estate would be some document executed by the company to him.

Q. I would like to have you examine that paper and state whether or not you are familiar with it?

A. I have seen that before.

Q. Just read the description in the paper, if you please?

Mr. CLARK: I object to the reading of it; the paper is the best evidence.

Mr. HOYT: You have here a certified copy of it.

321 Description in paper read, being the description in deeds to C. I. M. Co. of its property above referred to.

Q. Now I will ask you if you can locate all this property. I will have this paper marked and offer it in evidence. Look at the map if you please, and see if you can locate that.

A. I can.

Q. Let me ask you whether or not there was ever any claim on the part of the complainant during the time you were superintendent disputing your right to the entire east half of section 10, as superintendent or agent?

A. No, sir; no such claim was made to me.

Q. Did you ever hear of any such claim being made?

A. I never did.

Q. Let me ask you during the entire time that you were superintendent and agent, what was the boundary line of the Cleveland property as recognized in the bed of Lake Angeline?

Mr. CLARK: I object to that as incompetent.

A. The south line of the east half of section 10, and the south line of the west half of section 11.

Q. I will ask you if you remember of ever having any conversation in regard to these boundaries with any representative of the Pittsburgh & Lake Angeline Iron Company, and if so, when you had it?

A. I had a conversation with Mr. Kidder, either in the summer of 1880 or the summer of 1881; I am very confident it was in the summer of 1880; at that conversation was present Mr. Morse; Mr. Morse and myself had driven over to the Lake Angeline mine and we were along the south shore of Lake Angeline, near that point on the map I can see here; the quarter post——

Q. That is the point?

A. Yes, sir, that is the point. Mr. Kidder said, addressing the remark either to Mr. Morse or to——

Mr. CLARK: I object to the statement as incompetent.

322 A. —or to myself, "Your company owns some land on this side of the lake; the post is about here;" we looked for the post without finding it, and at the same time he mentioned that the line extended over here across the lake.

Mr. HOYT: Which line?

A. The north and south line; the timber was cut away on the west side of the line; it had been cut away by the Lake Superior Iron Company; the timber on the east side of the line was standing, but lower down in that direction which would be almost east; the south line is in this direction, and the matter was mentioned again of our owning a little area of land there, perhaps the size of this room, where the north and south line and east line of the section meet.

COURT: You mean the center line?

Mr. HOYT: I mean the north and south center line of the section, the south line of the section as projected right from that angle.

Q. I will ask you if you as representing the Cleveland Company ever sank any drill-holes in the bed of the lake; and if so about when and where?

A. We moved the diamond drill on the ice of Lake Angeline in December, 1886, and began drilling the latter part of that month, and drilled in January, and found ore either in January or February; we bored three holes.

Q. When you found ore, what did you do, did you call it to the attention of anybody?

A. I reported to Mr. Mather, president of the company.

Q. Did you call it to the attention of, or have any conversation concerning it, with any representative of the complainant?

Mr. CLARK: I object to that as immaterial and incompetent.

323 A. Some time after the finding of the ore, I can't exactly say when, but within a few months, I had a conversation with Mr. Thomas Walters, who was at that time superintendent of the Lake Angeline mine; he had evidently heard of our find, because he mentioned it, but I explained what we had found, and he congratulated me upon it, and expressed his doubt of that ore extending across the line on to their property; in a later conversation with Mr. Kidder, the agent of the company, he expressed the same fear.

Q. Where were those holes drilled, approximately?

A. I should say right about there (indicating the shaft of the Cleveland Iron Mining Company on the north side of the lake) southwesterly from the center of the southeast quarter; his idea of this shaft—or his inclination was that it would intersect those holes.

Mr. CLARK: How far south of the shaft were those holes?

A. I should think the furthest hole out in the water might have been 300 feet from the shore.

Mr. HOYT: I will ask you if you have ever visited the lake mine of the complainant and if so, when and with whom?

A. You mean the Lake Angeline mine?

Q. Yes.

A. I visited that in March, 1896, with Mr. Ball, the manager of the Minnesota mine, and Mr. Wessinger, the master mechanic at the Minnesota mine, and Mr. Rasmusson who at that time was manager of the Champion mine, and with Mr. Thomas Walters, superintendent of the Lake Angeline mine, and a mining man who I think is sitting over there by the window, Mr. Tregambo, I believe was with the party, and I also think Mr. Bradt was with the party. I am sure Mr. Walters was there.

Q. Explain to the court what you did, and where you
324 went in the mine, and what conversation took place there?

A. Captain Walters sent his team down to the depot for us, and took us to the dry, and we put on mining clothes and went into his mine, that ought to be pretty near that figure 3; I should say it was further west, perhaps along there somewhere (indicating on the map); the map does not show it. This is the one clear up here; we went through different openings in the main level, and some sublevels, and finally over not far from the foot of the shaft that you have just pointed to (indicating shaft near the 16th corner). Before going to the foot of that shaft we went into some opening

somewhere in the neighborhood of those red marks, somewhere along there, somewhere near the trespass drift. There was some talk had with regard to the Cleveland Iron Mining Company trespassing over the line; Captain Walters said that the Cleveland Iron Mining Company claimed that the Lake Angeline Company had taken ore from the north side of the line, and called our attention to the Cleveland Company having taken ore from the Lake Angeline side, and that the taking of the ore from the Lake Angeline side had given them some loss because of the giving away of the ground, and he pointed out to us where the line would cross, the line separating the properties would cross the drift we were in. That is all the conversation we had when we were under ground. When we came up from that shaft, as it had been indicated, in the corner, we walked west from there to the office, and as we went in Captain Walters pointed out to us approximately the location of the line separating the two properties; that was the south line of section 10.

Q. Mr. Kidder testified here yesterday that some time 15 or 16 years ago Mr. Morse, who was then the agent of the company, had asked Mr. Kidder to join in a joint recommendation of the officers of the respective companies, getting them each to agree to quitclaim to them everything that lay north and south of the line respectively; that is, the Cleveland Iron Mining Company to quitclaim to the Pittsburgh & Lake Angeline Company anything that lay south of the line, and the Pittsburgh & Lake Angeline to quitclaim to the Cleveland Company everything that lay north of the line; and Mr. Kidder testified that he refused to join in that recommendation; did you ever hear anything about that?

325

A. No.

Q. Would you have been likely to have heard any such a thing, if it would have happened?

Mr. CLARK: I object to that as incompetent.

A. I should have been likely to hear it; yes, sir.

Mr. HOYT: Let me ask you whether, during all the time you were in the employ of the Cleveland Iron Mining Company, you ever heard any question made as to anything different in regard to the boundary line?

A. I never did, until Wednesday of this week.

Cross-examination by Mr. CLARK:

I was mining captain from 1880 until Mr. Morse retired, which I think was in 1883 or 1884. Mr. Morse attended to the duties of agent skilfully; he was a capable man in that line. There might have been some business in his line as agent that he did not advise with me about when I was mining captain; that would be very likely, that was his custom, to do that way. He required those under him to attend strictly to their own department, and if they did so they got along first rate with him; otherwise not. I took

his place in 1883 or 1884 as agent, and continued up to the
326 first of June, 1887, and then was succeeded by F. P. Mills.

During the time that I was agent, I discovered this ore on the north side of Lake Angeline. I then began a shaft there about 300 feet away from the drill-holes. I did not complete it before I took charge of the Minnesota Iron Company. I think the shaft was 55 feet deep when I left. I put down three drill-holes and struck ore.

Q. And that was all the work you did in the way of discovering ore, was putting down those holes?

A. If there was any more discovered beyond the drills I mentioned, it was by drilling more holes; my memory is not certain whether three or five; I remember three positively; beyond that I did nothing in the way of finding ore.

Q. Your impression is that the furthest hole you drilled was 300 feet from the shore of the lake?

A. From the shore; the shaft was some distance from the water. I should think it was about 150 feet; the shaft was on a slope of 55 degrees to the southwest. I cannot testify to the general dip of the rock at that point; I do not remember.

Q. Now, how came you to go with Mr. Morse to speak to Mr. Kidder with regard to this south line?

A. Mr. Morse and I drove around to the Lake Angeline, to see what those people were doing, out of curiosity you may term it; what they were doing at their mine, their entire workings. We didn't go into any mine. I should say we met Mr. Kidder first in the vicinity of these workings which were then along on the south shore, the old part of the mine, east of the present office. Well, the old workings might have been 100 yards east of the old office. We went farther west than that, clear down to the bay that extends down to the south; did not go beyond the bay to the west.
327 Beyond the bay would be to the east; there were no workings over there.

Q. What brought up the subject in regard to this center line of 10?

A. Mr. Kidder bought up the subject casually. I do not know of any reason why he should bring it up. He volunteered the information that we had some land there.

Q. What did he say in volunteering that information?

A. He said that, "Your company has a piece of land here, and the stake should be," indicating about the place where it should be; Mr. Kidder and myself looked around there for the stake without being able to find it.

Q. Now, do you know where lot 6, section 10, Government lot 6 is located, this piece I now show you on Complainant's Exhibit F, entire of lot 6?

A. How do you mean do I know?

Q. Do you know that the Cleveland Iron Mining Co. had a piece on that lot?

A. Yes.

Q. You knew that the Cleveland Iron Mining Co. had a piece on that lot 6?

A. Yes.

Q. You knew that the Cleveland Iron Mining Co. got a quitclaim deed from the Lake Superior Iron Co. up to that center line, did you not?

A. I did not.

Q. You didn't know that as agent of the company?

A. No; never heard of it.

Q. You did know that a portion of this lot 6 belonged to the Cleveland, because that lay east of the center line of 10?

A. Yes.

Q. Now was that the point at the center line of 10, that Mr. Kidder spoke of your having some property?

A. Yes.

Q. Do you know what date that was when he made that statement?

A. The day of the month?

Q. No; the month and the year?

328 A. I can't tell the year; it was either in the summer of 1880 or 1881, and I believe it was in the summer of 1880. I fix the time because it was very soon after I assumed the duties of superintendent of the Cleveland mine.

Q. Did you go over there to the east at that time in looking over the mine, when you pointed out this piece, or he pointed out this lot 6 to you, the territory there?

A. We were down to about that bay, as I said a few moments ago, and then walked back.

Q. What did Mr. Kidder say, after you walked to the east of the center line of 10, what further did he say?

A. We had been east of the center line of 10 before these remarks I have related were made. He described the line and the direction it went from there across, about as it is laid on that map; he mentioned the south line of section 10, I am sure.

Mr. HOYT: Mr. Morse was there some little time while you were superintendent, and the question of Mr. Morse leaving there and your being agent was considered, was it not, talked about, prior to the time when he actually did leave?

A. Yes.

Q. I will ask you whether or not he posted you thoroughly in regard to matters relating to the Cleveland Iron Mining Company?

A. I think he did.

Q. Did he say anything about there being any disputed boundary on the south line of Lake Angeline?

A. No.

F. P. MILLS, sworn as a witness on the part of the Cleveland Iron Mining Company, testified as follows:

Direct examination by Mr. HAYDEN:

329 I am not now a resident of Michigan, and am not connected with the Cleveland Iron Mining Company. I was agent for that company from June, 1887, until February, 1896. I succeeded Mr. Bacon in that position. The main workings or shafts and levels on the north side of Lake Angeline opened up the deposits discovered by Mr. Bacon in 1886, with regard to which he has testified, and were opened under my direction. The drift from the workings on the north side of the lake across into the south deposit of the Cleveland Iron Mining Company was run in 1894; it was run from the main workings on the north side of the lake underneath the surface. I knew the fact of the discovery by the Lake Angeline Company of the iron ore deposit, which became known as their east end mine; I knew of it about the time of the discovery. I think they began sinking their shaft about 1890; I am not sure. I kept track of their developments as they made them from their shaft. Very frequently Captain Walters and myself and Mr. Kidder interchanged views in regard to our different mines, and we knew, and they always knew, what we were doing. Captain Walters, Mr. Kidder and myself were always friends. In their development of the east end deposit from their shaft as they worked towards the south section line of 10 from the shaft, they continued to the west until they run into jasper; it was jasper cutting them off from the pitch of the deposit at the first level of the mine, which I think was 147 feet deep; that was a little north of west. I don't know just how far south it would be measured at right angles to the line; but measured in the direction in which they were going it lacked about 50 feet of intersecting our line. I was notified at the time when they reached that rock at the head of their drift. When they reached that point they stopped. We then asked permission of them
330 to put a diamond drill in their works where they left off and we put in some diamond-drill holes, five holes, disclosing this ore beyond the point and across the line.

Q. Won't you state fully just the condition of their drift and what it showed, and what its prospect was at the time when they stopped?

A. The drift west from the shaft was good ore up to the time or point where they left off, but at that point it had run up against the jasper capping.

I had a conversation with Mr. Kidder and Capt. Walters regarding this capping of rock they run against. I think the Captain explained that he thought the chances were favorable for our getting ore beyond and deeper down. That was in 1892, I think it was in August or September. I had been over there before that time to know whether the ore from that shaft was running toward the line. I was familiar with the work from the time they started exploring; the explorations and this work started much further east, where they were exploring alongside of it. As soon as the development was made sufficiently to determine that the vein found there

was tending in its course towards the section line I knew it. I started with our diamond-drill work in September, 1892. As a mining man, from the condition of their drift as they stopped it at the head of the rock, I had every reason to think there was ore over the north side of the line. I didn't know it absolutely, I couldn't know it. The indications of ore with the dip of the foot and the pitch of the capping, and the trend of the formation, the shape of the fold, everything had a tendency to show that the ore would go across. That same appearance was in existence at the very outset of that drift from the shaft. We drilled from the Lake Angeline
331 Company's side five holes from their workings. We obtained permission from both Mr. Kidder and Capt. Walters; we talked about it in a general way; I remember both Capt. Walters and Mr. Kidder talking with me. I told them not only what I wanted to determine by those drill-holes, but they wanted to help me find the ore across the line; no reason that I know of, except that we were on friendly terms, and I felt under obligations to them for telling us in regard to their work, that was of use to us. We had interchanged civilities and kindnesses, and this was a part of the program, their kindnesses to me. Previous to that time we had let them occupy some of our ground up further east, which would be the southeast corner of section 10, we had allowed them to use some of our ground and mine out a good deal of ore; we allowed them to put in a track to take it out; this other was after that time. This track that I have mentioned was on the north side of the section line, where it crosses the water at the southeast arm. They obtained permission from me to put that track there. I am not sure whether it was Capt. Walters or Mr. Kidder that obtained that permission. That was before any work was done at this lake shaft; I don't remember just what time. It was in 1888 or 1889, it was as early as that year. Mr. Walters and Mr. Kidder knew from time to time as we progressed what were the results of our diamond drilling; we told them what the drillings were, and in fact gave them complete copies of our maps and records showing not only the ore but the analysis of it, not only of our side but on their side, and on each of those maps were the drill-holes, and after it crossed the line we put a star showing the ore on their side. The star was to indicate the south line of section 10, the division of the properties, as they both understood it.

332 We discovered ore in all of those holes. In the holes running northeast there was some ore, not as much as in the holes to the northwest. That diamond-drill work was completed in the early part of 1893; how early I don't remember; the maps will show. The exact and full value of the deposit of ore on our side of that south line of 10 was not discovered by the drill-holes, because we didn't have sufficient data from five drill-holes in the deposit to tell what it would amount to. The borings were not extensive enough; we couldn't from one point determine it very well. To further determine the value of this discovery, we put down some surface holes after that time; these were immediately north of where we had been drilling undergound.

Q. I call your attention to the three red dots marked on this large map here, here and here, and ask you if those marks would represent as near as you can judge, the locality of three of those holes (referring to Defendant's Exhibit 28)?

A. Yes, and there were two others apparently not marked, on what is indicated there as dry land. They are surface drill-holes. Previous to all this we drilled a long hole from the first level clear across almost to the line, nine hundred and some odd feet. We had drilled in 1888 or 1889 from our north side workings. We had determined, that we had the ore formation, but we didn't get any merchantable ore; we concluded that we were too high up, but we couldn't put any drill-holes down deeper, because our north side mine at that time had not obtained a greater depth. The Lake Angeline Company knew at that time of our running the long drill-hole from the north side across. I think I talked with Captain Walters before we started, to get his opinion about it; I am not sure, but I think so, because we generally interchanged views.

333 To determine the extent or value of the south side deposit, we drove the drift through to it, from the north side workings, through to the south side. It terminated in this ore; they had taken up the five drill-holes on the Lake Angeline workings. It extended to a point about 100 feet north from the south line of section 10.

—. Where did the diamond-drill hole terminate that you ran through from the north side?

A. That went considerable further to the west, and over the top of where we connected—or it run as far as the south line of 10; it didn't quite reach the line, as I remember it; we run it as far as we could, but we had a great deal of difficulty in running it on account of caving ground and an immense amount of water that flowed out of it. We intended to reach the line. This drift from the north side across to the south side was started early in 1894, and was completed either the last of 1894 or early in 1895. When that drift was completed we did other work to develop this deposit and show the value. We drove a number of drifts; as soon as we struck the deposit we turned a drift east and another one west, or approximately in those directions along the foot wall, and at the same time that those two drifts were driven we continued on south to the section line, and also drove two other drifts to the west, dividing up the deposit. This was to enable us to mine it out; also to develop the deposit. These drifts were all what the miners call dead work, for the purpose of showing what the deposit was, the developments of the work, and was not mining work. We followed that up with regular mining work, by putting up raises, and in making sublevels afterwards. That work has continued ever since; we have continued actively in developing and mining of that property ever since. This work was going on continu-

334 ously together, both dead work, and mining, up to the time that I left, and that was I think the first week of February, 1896. In the south deposit we made a very large drift going to our north-side workings in order to put in a double track if need be, a

double, electric tramroad track. This drift was completed for that purpose, and the track was put in, but when I left there was but a single track; whether they have put in a double track yet I don't know. Before I left there was 620 feet of track put in for the purpose solely of reaching the south-side deposit, and connected the several drifts of that deposit in the different drifts and stopes. I think that was the distance through from our foot wall on the north deposit to the foot wall on the south deposit; and there must have been about 350 feet of track due to the workings that had been made up to the time I left. I have not lately been in the mine, and do not know how many feet of track they have added. This track was a forty-pound T rail of steel, and an electric equipment was put in to operate the cars. The Lake Angeline Company, Mr. Kidder and Captain Walters knew about the putting on of the electric appliances, and of this development work that I have spoken of. Captain Walters and our engineer went east to look over some electric railways in the anthracite and bituminous districts of Pennsylvania before we put in our plant.

Q. Now in 1892 a pumping contract was made for pumping out Lake Angeline; what, if anything, had you to do with the negotiations preparatory to making that contract, with Mr. Walters and Mr. Kidder, relative to the terms upon which it should be entered into, or whether it should be entered into?

A. Well, we had often spoken about the advisability of pumping out the lake, and desirous of having it done, but we couldn't
335 for quite a long while get the Lake Superior Iron Company to join with us; the Lake Angeline were willing, but we had never discussed much as to the relative proportions each of us should bear, only they were willing to go into it, and we were willing, and they said they would be willing to pay their proper share, and we were satisfied too, and it was simply a question of the willingness of the Lake Superior Iron Company to enter into that contract; that is what delayed us until that time.

Q. When the Lake Superior Iron Company became willing to enter into the contract, was there any discussion between you and Mr. Walters and Mr. Kidder regarding the terms on which they would enter into it?

A. Yes, when the Lake Superior Iron Company were willing to enter into the contract, then the question of terms came up, and the terms were fixed as they are indicated in the contract.

Q. What discussion, if any, did you have with Mr. Walters and Mr. Kidder?

A. I don't remember any particular discussion with them. There was a proportion which they were to pay, and there was a freedom from any expense of the keeping of the lake dry after it was pumped out for the Lake Angeline Company.

Q. Now, as a reason for their freedom from that subsequent expense of the permanent drainage, the subsequent drainage, the continuous drainage to follow the pumping out of the lake, what was said?

A. Well, they didn't think they should stand any proportion of

the permanent drainage, because they said the lake was 43 feet deep, and their arm of the lake was only 11 feet, and they claimed that anything below 11 feet they wouldn't be bothered by the lake.

Q. What part did they refer to as 11 feet deep?

A. The southeast arm of the lake.

336 Q. Was there any reference made by any of you in your conversations as to where your line was beyond which they would not be interested in the pumping?

A. Only in regard to the depth of their portion of the lake.

Q. Was there any boundary line referred to?

A. Yes, the boundary line of ten, the south line of section ten.

Q. While you were agent of the Cleveland Iron Mining Company, did you ever hear of any claim made by the Lake Angeline Company to any portion of the lake bed north of the south section line?

A. The question never came up while I was connected with the Cleveland Iron Mining Company; I never had any intimation other than that we owned all north of the line; we never assumed anything different from that. We did assume that. The Lake Angeline Company did not assume anything different or claim anything different while I was connected with the company.

This electric tram-track which I have mentioned is put down in a very substantial manner, like an ordinary steel railroad track, and on cross-ties and heavily bonded with copper wire.

Q. I show you a letter by yourself to Mr. Kidder, dated January 30, 1896, and ask you if you had any conversation down in the mine with Mr. Kidder and Mr. Walters in reference to it; this is the letter which is Defendant's Exhibit No. 20?

A. Yes, I wrote it.

Q. Whether or not both maps attached to that, both the small sheet and the blue print, were furnished to Mr. Kidder?

A. Yes, sir, with the letter. This is an acknowledgment of the trespass of the Cleveland Iron Mining Co. on the Lake Angeline Co.

Mr. HAYDEN: I now offer in evidence this second map attached to this letter which was heretofore identified, which is attached as one of defendant's exhibits and is Defendant's Exhibit 22.

(Here follow maps marked pp. 337 & 338.)

339 I had one talk subsequently with Mr. Kidder regarding that trespass referred to in the letter. I think we talked in their office, and also we went under ground. I remember that particular trespass, our mining captain wasn't quite willing to acknowledge it, and I had to adjust it myself. I don't remember about it much further than that we were sorry that we had committed the trespass and that it was done unintentionally, and Mr. Kidder and Captain Walters and the mining captain of the Lake Angeline Co., and our mining captain, and different engineers were all down looking it over. The trespass was determined with reference to the line which the two companies had mutually put in, or had checked

up on; the line was established about at that same place in July of 1895, and was again referred to at the time of this subsequent trespass; we checked up on these same nails that indicated the line, that is, the south line of section 10.

Q. Did you have any negotiation with Mr. Kidder relative to the permission of the Lake Angeline, to be given by the Cleveland Iron Mining Co., for the building of this railroad track across the southwest quarter of 10 on the bed of the lake, as shown by this line of railroad track on this map, curved line?

A. Yes, sir, I had talks with Mr. Kidder in reference to all these lines.

Q. What talk did you have with him in reference to this permission to be given to build this railroad track marked on this large map (Def't Ex. 28) as L. A. I. Co. track, built in 1895 and 1896?

A. That is the one that runs by the island now?

Q. Yes.

340 A. I am not sure whether that track was fully completed when I left, or not, but I gave them permission to change the track over down near the boundary line, up toward the island; and I suggested it was possible at the time that we might put a shaft down by the island ourselves, and if we did we might want to use the track, and they said that was all right.

Q. Was anything said between you and Mr. Kidder about the operations conducted by your company in the ground beneath portions of that track?

A. Well, we had an understanding in regard to the workings on either side of the line; we furnished them all the information we had, and perhaps we also got from them such information as they had, and copies of their maps, and tried to prevent any trespass, one by the other, that is general.

Q. I wish to call your attention particularly, whether or not you talked with Mr. Kidder about the possibility of the working in your south-side deposit some time or other letting down this track they were about to build across there?

A. Oh, yes.

Q. What was that?

A. Well, I don't know, only in a general way; it must have been in regard to the possibility of letting the tracks down; we couldn't have given them permission to run over any of our land—we couldn't certainly have stipulated that we would agree to maintain the tracks.

Q. Whether or not there was any conversation between you and Mr. Kidder to that effect?

A. No, I don't remember anything definite to that effect, in fact, I wouldn't consider it necessary, we both understood the matter so well.

Q. Who applied to you for permission to build that track?

A. I don't know whether it was Captain Walters or Mr.

341 Kidder. It was one or the other. I granted permission; permission was applied for in reference to that first track at the time they were working down at the southeast corner of 10, I think

in 1888 or 1889, somewhere along there, and we gave them a kind of general letter, giving them permission to go anywhere down there and put heir track.

Q. Now regarding the track built in 1895 or 1896 afterwards?

A. They changed the track afterwards; they asked permission, although they needn't have done so, because that letter would have permitted it—they asked permission to change the track a little further to the north, because they had some caving ground on their side; a while after that they changed it away over by the island, to be sure they would get away from any trouble; caving ground on both sides of the line. The last change must have been made in 1895; as I remember it was in the fall of 1895. I don't think it was entirely completed before I left; it was built, of course, across a portion of the lake there.

Q. Now I want to call your attention to this map for a moment, and ask you—that large map dated May 15, 1893, scale 100 feet to the inch; I want to ask you if you remember of the lease asked for by the Lake Angeline Company for stock-pile grounds around the south line of section 10, and near their shaft-house at their east end mine; was it north of the line?

A. Yes, sir; and was asked for by the Lake Angeline Company. I know where its location was, the general location, I know where the 1893 trespass was.

Q. Whereabouts with reference of that 1893 trespass drift were those stock piles located which they put out there from their mine, under the terms of that lease?

A. Over the trespass and to the north and east of it?

Q. East or west?

A. East and west, both. It extended over the trespass,
342 over the bed of the lake beneath which the trespass was, I should say about 70 feet where the stock pile actually existed, but I am not clear as to that. Some portion of it extended over the trespass; I don't know how far it extended to the west, but I understood at the time it was both to the east and west, and to the north of it. A large portion of that stock pile was in the bed of the lake at that time, and north of the line. It started there on the shore but ran out over the old bed of the lake.

Q. Was any new permission given other than under the terms of that lease to the Lake Angeline people for that stock pile?

A. No, the lease was simply for stock-pile purposes, and it protected us in several ways in case we caved the ground underneath their stock pile.

I heard you read to the court a short time before I came on the witness stand a lease of the stock-pile ground, and the letters acknowledging the receipt of triplicate copies of it. That is the lease I refer to. It was under the terms of that lease that the stock-pile ground was put on the bed of the lake north of the mine above the trespass drift, and in that vicinity spoken of. I do not know when those stock piles were removed from that point, if they have ever been removed. I think since I went away that ground has caved in, and if so, they couldn't, of course, have a stock pile there; whether

it pulled any of their stock pile in or not I don't know. By stock pile, I mean the pile of ore mined from the mine for shipment. I never knew of any application by Mr. Kidder for a lease from the Cleveland Iron Mining Company to the Lake Angeline Company of the right of way for the railroad track built in 1895 and 1896. I left it with the letter which I originally gave them; they simply asked at one time to change the location of the railroad, and I gave them verbal permission to do so.

343 Q. Have you a copy of that letter?

A. The letter in regard to the track?

Q. Is that your letter you wrote them, giving them permission for the railroad track?

A. No; I don't know where that letter is. I gave them a letter; I have not a copy of it. There must have been a copy of it made at the time without a question, but I have not seen it since I got back; I didn't look for it.

Mr. HAYDEN: Mr. Clark, have you any objection to producing on behalf of your company that letter, if there is any such, that I have referred to, granting permission to the Lake Angeline Company to build a railroad track over this land in this vicinity?

Mr. CLARK: I don't know whether it is here; we are willing to produce it if we can find it.

Mr. HAYDEN: As I understand you, this talk with Mr. Kidder and Mr. Walters in their office, and down in the mine, about this last trespass that occurred just before you left, was just before you left the employ of the company?

A. Yes, sir; very shortly before I left, and I wanted to fix it up before I went away; I remember that.

Q. Whether or not the driving of this drift, and making the drift for the railroad track added to the work of putting in the electric plant, and doing the dead work, were expensive operations?

A. Of necessity, they were a good deal of expense.

Cross examination by Mr. CLARK:

Q. Do you remember your taking a paper to Captain Walters and saying to him that Mr. Mather, the president of your company, wished him to sign that on behalf of the Lake Superior Iron

344 Company, admitting that his company didn't claim any right north of the south line of 10, and that they didn't want any of that territory?

A. Who didn't want any?

Q. That the Pittsburgh & Lake Angeline Iron Company didn't want any of that territory.

A. North of the south line of 10?

Q. Yes, something to that effect.

A. I don't remember, no, sir.

Q. About three years ago?

A. I remember that I certainly did not.

Q. Do you remember taking any paper to him, and asking him

to sign it, that Mr. Mather gave you to have him sign, or wanted him to sign, about three years ago, or any other time, in regard to the boundary?

A. I couldn't have brought anything after the pumping contract, but I might have brought previous to that; I don't know; but I have no recollection of any such a paper as you speak of at any time.

Q. Will you think it over before you leave?

A. I will think it over. The putting in of this electric power was to lessen the cost of tramming the ore, and it did so. The deposit to the north of the lake was divided from the south deposit by a diorite fold through which the drift was driven; there are several diorite folds; there are two ore formations in that diorite; we went through several folds of diorite, with the drift, and it separated the north formation of ore from the south formation.

Q. Now in these drifts you made in the south formation, after you got the ore by the drill-holes from the Lake Angeline, as you drove in ore, did the drifts driven in ore—did you take out ore enough to pay for driving the drifts?

Mr. HOYT: I object to that as incompetent and immaterial.

345 Q. You have spoken of preparatory work?

A. I doubt very much whether they did pay, because it was expensive; we had to put in a heavy track, and put in——

Q. I mean simply driving the drift; I am not talking about the track—I am talking about the driving of the drift itself?

A. We couldn't drive the drift without putting in the track.

Q. The track was used for tramming the ore after you got the drift driven?

A. Yes, sir.

Q. I am asking you, leaving out the cost of putting in the track; whether driving the drift independent of the track would be paid for, the work of driving it, by the ore taken out?

Mr. HOYT: That is objected to; the same objection.

A. We couldn't drive the drift without putting in the track; and the putting in of the track necessary to drive the drift would cost more than we could get out of the ore.

Mr. CLARK: Leaving out the cost of the track for the present, would the ore taken out pay for the work of driving the drift in the ore?

Mr. HOYT: The same objection.

Q. Independent of the track?

A. Well, it might possibly, I don't know as it would; my best judgment would be that it would not come far from it; perhaps it would be even; that would be my best judgment. And the track that was put in would be a permanent improvement for the taking out of the ore that would be afterwards stoped from the drifts. I think I put in about 350 feet of track in that south formation for the purpose of mining, before I left, though I am not sure; I have

not measured it up. The rails that were put down in the drifts were forty-pound steel rail; I don't know what I paid per ton
346 for them; I think we had to pay $35 for that kind of rail at that time, though I am not sure; as I remember, it was about the going price at that time. They were laid on ties in the drift; and I should think that the ties were laid about every 20 inches or two feet apart. The ties didn't cost over ten cents apiece. I don't know what it was worth to lay that track per hundred feet.

Q. Can you give us an outside estimate of its cost?

A. That is, including the binding of the track and putting up the electric wire?

Q. Everything, yes.

A. Putting in switches and frogs?

Q. Yes, everything, making it ready for work.

A. It wouldn't cost, I don't think, over a dollar a foot.

Q. What was the cost of putting in the drift through the diorite from the north formation to the south?

A. I don't remember; the first portion of the drift was comparatively easy to drive, but we got into very hard material; I remember that we let a contract for the first part of the drift, and afterwards we had to put it on company account, because they didn't make any wages. I think about a quarter was driven by contract and the balance company account. The contract was $8 a foot as I remember; the men made 32 cents a day; the rest we did on company account; but that cost didn't take in the entire cost of driving the drift; we had considerable extras besides the contract price to add; we had to handle the material; that was extra, in addition to the driving of the drift; and as I remember, we had ome trammers that didn't enter into the contract at all.

Q. What would be your estimate on an average of driving that diorite drift, the whole thing, per foot?

A. I should say possibly $15 might have covered the en-
347 tire cost of it; that would be my judgment; the drift was a large one, about 10 or 12 feet square made for two tram tracks. We did not put in double tracks while I was there. It was a track similar to the character I have described, and its construction per foot would be according to the construction I have stated. We began mining ore as soon as we struck it in January, 1895. We got our drift through to that point by that time; we mined in that year from there about 40,000 tons; its quality, generally speaking, was very good, first-class Bessemer ore; it averaged about .030 or .035 in phosphorus; and in metallic iron I think about 65 per cent.

Q. What would you estimate to have been the average cost mining the ore and putting it in the skip, and taking it up to the surface, including everything?

A. Well, perhaps I might explain that the expense of mining the ore the first year was necessarily high, because of the expense of developing and opening up a new deposit and different things that had to be done.

Q. Leaving out the tracks already referred to, I mean the real mining work after the tracks were in, and after the electrical appli-

ances were in that you have described, the cost of driving the drifts and mining?

A. The cost of producing the ore, which was produced, and that was largely produced from opening work and development work, I should place it at about $1.25 a ton.

Q. Driving drifts and things of that kind?

A. Yes, taking the production for a year; you can't take it for a week or a month; you have got to take it over some considerable time, or your costs (estimates) are of no account.

Q. The first year when you were opening up the mine?

A. Yes, sir, after we had struck the ore.

348 Q. After you had got the mine opened up, how much did you mine there—at what time did you leave there?

A. I left February, 1896; I had only one year at it.

Q. What length of side drifts did you drive when you were there, and how many?

A. We drove a drift southeast on the foot wall, and northwest on the foot wall, and one drift south across the deposit to the section line, and two side drifts between the northwest foot-wall drift and the boundary line; all in a good quality of ore. We had got the deposit well opened up for the next year's mining. The deposit at that level was at that time rather small, but such as it was we had it fairly well opened up on that level. I don't think we could have worked 100 men in it at that time, the deposits wasn't large enough to work that many to advantage. I don't remember how many men we could have work- to an advantage, possibly, about fifty men on the two shifts.

Q. With 50 men, with the mine opened up as you say in that fall, what should it have cost to have taken out the ore, that is, with those drifts all driven?

Mr. HOYT: The same objection continued.

Q. With all the tracks in?

A. That would have come in the following year, of which I didn't have any knowledge.

Q. What would be your estimate, understanding the workings and the location, what would you say it would cost?

A. It would be better to have my successor state that price.

Q. Yes, but we have confidence in your judgment; we want you to give your judgment.

A. I don't know what development work they did in the following year.

Q. No; take the development as you left it there?

349 A. You can't take the development as I left it: the development has got to go on continuously in order to work the mine.

Q. Well, the ordinary development we will say?

A. We can't tell that without being familiar with the mine; I don't know what development was necessary after I left. I could not give a judgment about it.

Q. Do you know what that quality of ore was selling for in 1895?

A. No, sir; I had nothing to do with the selling of the ore; and nothing to do with the settling for the freights from Ishpeming to Marquette.

Q. Now I show you a map here that is marked as the map of James E. Jopling, Exhibit H, the engineer of your company at the time you were there, showing the 220-foot sublevel, and referring to the stock piles, being a copy of the map previously shown you by Mr. Hayden, and ask you if you remember a dock down here near the south line of 10 on the Pittsburgh & Lake Angeline workings?

A. Yes, sir; I remember the dock.

Q. Do you remember the two stock piles that you were asked about by Mr. Hayden?

A. The stock piles had been mined off; this was January 22, 1896, and the stock piles had all been shoveled off; this is a new stock pile you are showing now.

Q. I show you this circle here marked stock pile of the Pittsburgh & Lake Angeline Company and ask you if there was while you were there, a stock pile at that location?

A. There was a stock pile, but it extended further west at the time I was there, and I presume this particular time the stock pile was in the place you indicate.

Q. Was that the one that came up to the shore of the lake?

A. That is the one that extended over into the old bed of
350 the lake—I am not sure about that; I think it is: it may be the new stock pile they were putting in, with reference to this new railroad track; as I remember it, the old stock piles that were there the previous summer extended closer along the line right in through here.

Q. How much did that extend over the margin of the lake then?

A. I should say 150 or 200 feet, maybe, maybe 250 feet. I would not be positive about that.

Q. Do you remember this stock pile down near the south line of 10, and lying just a little ways east of this dock to which I have referred; do you remember that stock pile?

A. These are new stock piles, started in 1895, and accumulated apparently up to that point in January, 1896; I don't remember much about those stock piles; I do remember about the stock piles that were there the previous year, that extended further west, because I remember seeing the steam shovel working in there. I remember their location, and think those are right, as they were at that time; but a stock pile changes from year to year and from day to day, with the quantity of ore taken out and the amount shipped.

In reply to Mr. Hayden: Samuel L. Mather was president of the Cleveland Iron Mining Company when I first came into the employment of that company; I don't remember how long he remained president. He remained so until the time of his death; I think that was in 1891, somewhere along there. His death might have been October, 1890; I don't remember. I remember the occurrence very well, but the date I have forgotten.

Mr. HAYDEN: This is Mr. Kidder's letter; is there any objection to it?

Mr. CLARK: No objection.

351 Mr. HAYDEN: And this letter-press copy of a letter written by Mr. Kidder. I offer this letter of Mr. Mills, dated May 8, 1897, in evidence.

Mr. CLARK: No objection.

Received in evidence and marked Exhibit 23, and is as follows:

DEFENDANT'S EXHIBIT 23.

Lake Angeline mine.

MAY 8TH, 1890.

A. Kidder, Esq., agent; Capt. Thos. Walters, supt.

GENTLEMEN: This will permit you to run tracks over the S. ½ of the S. E. ¼ of 10, the S. W. ¼ of the S. W. ¼ of 11, the N. W. ¼ of the N. W. ¼ of 14, 47–27, in such a way as you may desire. We have no ore that amounts to anything near the corner of 10, 11, 14 and 15, where your new find is located, and ore we have found on lake shore a short distance northwest of this corner seems to dip rapidly under the lake, and we expect to bring it all up through the "Lake mine shaft." Should we at any time find ore that could more advantageously be brought over your track, we would expect to be able to make a satisfactory arrangement with you, and this will stand as the consideration for above grant.

Yours truly, F. P. MILLS, *Ag't.*

Mr. HAYDEN: And also the letter of Mr. Kidder, dated May 27, 1890, and which is as follows:

352 DEFENDANT'S EXHIBIT 24.

MARQUETTE, MICH., *May* 27, 1890.

F. P. Mills, Esq., ag't Cleveland Iron Co., Ishpeming, Mich.

DEAR SIR: Your generous grant to the Pittsburgh & Lake Angeline Iron Co. of the use of a portion of your land for a railroad track, was duly received. Please accept our sincere thanks. It is understood that in laying this track, we acquire no right to the land, no matter how long we may use it, and that we are to vacate the premises at any time at your request.

Very truly yours, A. KIDDER, *Ag't.*

JAMES E. JOPLING, a witness, sworn on the part of the Cleveland Iron Mining Company, testified as follows:

Direct examination by Mr. HAYDEN:

I made that large map of May 1st, 1897, on the scale of 50 feet to the inch (map referred to is Defendant's Exhibit 28).

Q. State whether or not that map as to the section lines and section and quarter corners marked upon it, is correct.

A. It is.

Q. I ask you whether or not the shore line of that map was made by you, drawn by you.

A. The survey?

Q. The survey.

353 A. From the south side, from the west to meander corner 16 up to the outlet, the survey was made by me, in the year 1890; made at the request of the Pittsburgh & Lake Angeline Iron Company. That covered the shore line as I drew it from the meander corner 16 to the outlet of the lake, practically to meander corner 13, and nearly on the south side of the lake.

Q. And as to other parts of the shore line, what authority did you use for drawing it on the map?

A. A joint survey made by the engineers of the Cleveland Company and the Lake Superior Iron Company in 1892.

I did not ask Mr. Cummings to examine this map with me with regard to the shore lines. I did not make any examination recently of that part of the shore line above meander corner 16 extending up to that north and south section line, in company with Mr. Cummings. I did examine from the shore line as shown near the meander corner number 16 north, part of it has caved down.

Q. What knowledge have you as to the correctness of your shore line on this first course, on the shore line northwest from the section line near meander corner 16, and the first course south from the section line near meander corner 16?

A. The surveys overlap at that point, both the joint survey and mine; they are practically the same.

Q. I want to ask you if the meander lines drawn on your map are correct, according to the field-notes of the Government survey.

A. The meander corners are put in proportionately, and the meander lines are put in *pro rata*, according to the usual practice adopted by authority of the decisions in books I have used, decisions of courts. Those rules were laid down for the guidance of engineers.

354 Q. I want to call your attention to this point extending westerly from the shore line a short distance south of the section line, and in the vicinity of meander corner 16, this sort of a parallelogram, the land extending to what appears to be water, and ask you what it is.

A. That was made from the rock taken up from the shaft for the purpose of carrying the railroad track; made by the Pittsburgh & Lake Angeline Company, in the course of their mining operations It is represented on the map as made ground. I understand the word accretions to mean natural accretions, as distinguished from made ground. Those checked lines are drawn on the map to represent made ground. I found that the shore line at that time in 1890 was made ground, as to that part south of the section line.

Q. Now I ask your attention to some of those dark checked lines on the shore line west of the south quarter corner, and ask you what that represents?

A. That is also indicated on the map by the word "made ground," made by the Pittsburgh & Lake Angeline Company, made

by rock taken out of their mine, and dumped into the lake by mining operations.

Q. This map of the shore line from which you took this was in existence in 1892—when was it made, in 1892?

A. The joint survey in 1892 was made in the spring before the pumping was commenced.

Q. Have you that copy with you, a copy of that same map here, so you can show it to Mr. Bradt?

A. I am not sure if I have a copy or not.

Q. Do you know what map was used by the three companies at the time this pumping contract was made, with reference to determining what the state of the water in the lake was, and its depth, etc.?

A. There were several maps used; some were made previous to this.

355 I think the calculation of water was obtained and made in 1891; I am not certain. I drew into this map this particular shore line as representing the shore line of Lake Angeline because it was verified by the engineers of both companies and accepted by the Lake Superior Iron Company and the Cleveland Iron Mining Company, for the purpose stipulated in the contract for pumping out the lake, as the area of water at the time of pumping. It was made for the purpose of making the pumping contract, for the settlement of their relations between them in that contract.

Q. Have you ever compared it with any data of Mr. Bradt, or compared it with Mr. Bradt, with reference to data that he was familiar with?

A. In certain portions.

Q. What were those portions?

A. The shore line at that point, between the two points I have mentioned.

Q. Between meander corner 16 and 13?

A. Not along the entire length; I say just at that point, near the meander corner 16, where it crosses the section line, and both ways from that for a few hundred feet on each side.

Q. I asked you whether or not Mr. Bradt agreed with you as to the shore line, as established by you there?

A. We agreed in the manner that it compared with our maps; I don't know that he ever made any survey of that shore line.

Q. Have you obtained in any way the data which Mr. Cummings has been talking about in his testimony, or obtained information of it?

A. About the old shore line of the lake?

Q. Yes.

A. No, I never have worked on that. I heard Mr. Cummings' testimony in part. I don't think I was present when he stated how he found the shore line on the southeast arm of the lake near meander corner 16; I don't recall it.

356 Q. I want to ask you whether or not the shore line as shown in that vicinity near the meander corner 16, both

north and south from the section line, is a correct measurement of the original shore line?

Mr. CLARK: I object to the question as incompetent; it does not appear that he knows anything about it.

A. I wouldn't like to say. It is all broken down there; I wouldn't like to state just where it was at any period.

Q. Whether or not the shore line in that vicinity around that southeast arm of the lake is approximately correct, as it has been or was up to the time the lake was pumped, for many years previously?

Mr. CLARK: I object to that as leading and incompetent.

A. It was the shore line; I don't know how many years—several years previous to that time. I made a survey in 1890; that was two years previous to the pumping of the lake.

Q. When you made that survey in 1890, what parts of the lake did you visit in that survey, and what features and facts did you take into consideration in making it?

A. I was requested to represent on the map the actual water line at that time, and I did so. I went upon the ground and surveyed it. There were facts there to show that there had been different water lines, in some places, in recent years, prior to that time; where the ground would be very flat, a heavy rain might change the shore line a number of feet; I couldn't state the exact distance. In some places the shore line was very abrupt. I have in my possession a map of several trespass drifts, the one committed by the Lake Angeline Company in 1893 upon the Cleveland Iron Mining Company ore; and one committed in 1896, or about that time,
357 by the Cleveland Company upon the Lake Angeline ore. Those maps are shown in evidence here, and I am familiar with them. I know upon what scale they are drawn. I have compared my maps with Mr. Bradt's maps, with reference to the location of these trespasses. I have indicated these trespasses on this map (Def't Ex. 28) by red marks near the section line; they are in the exact location as near as they can be represented by map. I marked the P. & L. A. I. Co. line of railroad track in 1896, from a map drawn by Mr. Bradt. It is correctly drawn on our map (Def't Ex. 28) with reference to the quarter corners and section lines, and with reference to trespass drift, etc. There are upon our map some contour lines representing the depth of water before it was pumped out. They are correct from information in our office, made from a map of soundings (map shown witness being Def't Ex. 38). This is the map of soundings from which they were made. This is a tracing of a map that I believe was made in 1891 by Mr. Parnell. He was the engineer of the company in 1891, or possibly assistant.

Q. Did you ever compare that map with the data of Mr. Bradt's, the engineer of the Lake Angeline Company?

Mr. CLARK: I object to the question as incompetent, unless it appears that he refers to something Mr. Bradt has knowledge of.

A. I don't know of any map Mr. Bradt has of soundings. Mr. Bradt was with the Lake Angeline Company when this map was made. I think he had a copy of it. The contour lines of our map are drawn correctly from this hydrographic map (Def't Ex. 38) I have shown.

Q. There are some other marks on this map I wish you
358 would explain; they are the blue marks to the east of the easterly end of this southeast arm; what are they?

A. They refer to a dam and stream and ditch. I made a hasty survey a few weeks ago of that territory. They are located on that map approximately correct. This blue line marked on the map "launder" is a launder constructed to take the water from the earth dam, or rock dam, to prevent its flowing along the old bed of the stream, and so into the arm of the lake and down into the mine. That is not the draining flume referred to in the pumping contract between the three companies. The flume in the contract is constructed at the end of the lake, the lake itself at the southeastern arm; that is the end of the launder. Easterly from this straight blue line is the ditch, extending to the dam; and above the dam is the stream. From that point to the end of this southeast arm the launder extends westward. I have approximately shown that flume as stated on the map; also have marked on the map approximately correct the old bed of stream that went into that southeast arm. I ascertained it by observation on the ground; that lies north of the ditch. I think the ground is being tilled just now, but there is no doubt of its passing in that neighborhood because of the level; it is the lowest point in the valley. All of the ground to the east of that arm was not tilled; only parts of it. There is enough of it left to determine within a reasonable distance where the old bed was. The territory between this stream flowing into the southeast arm, or that once did so, and this eastern arm further north, is high and rocky, especially near the section corner, the southeast corner of 10. It is a perfect water-shed between this southeast arm and the stream flowing into it and the east arm, in all parts of the territory east of this intersection of the south section line of 10 with
359 the southeast arm, until the waters join in the lake at the mouth of the southeast arm. The point marked culvert on the map is a culvert placed under the railroad track built by the Lake Angeline Company in 1895, in order to permit the water which might collect to the south of that railroad embankment to pass beneath it, and run down to the pumps. Their launder didn't take away that water, because it was too high. The launder is about on the surface of the ground at that point, and the bed of the lake——

COURT: That water comes from the inlet or water made by rain?

A. By rain.

Mr. HAYDEN: What is this long mark, marked diamond-drill hole bored by the Cleveland Iron Mining Company?

A. That is the first diamond-drill hole bored by the Cleveland Company from their north line, I believe in 1889 or 1890, the one described by Mr. Mills.

Q. What is this marked P. & L. A. I. Co., built in 1895 across the south line of 10, about midway between the south and east shore of this arm?

A. That was the railroad track, I believe, built soon after the lake was pumped out; by the Pittsburgh & Lake Angeline Iron Company. This north railroad track was built in the winter of 1895 and 1896.

I had a conversation with Captain Walters about January 10, 1894, in the east end mine of the Lake Angeline Company, or in that vicinity, about the character of the deposit of the Cleveland Iron Mining Company on the other side of the line. Being interested to know what value the Cleveland Iron Mining Company might have in that part of the lake, I accompanied Mr. Kidder from Marquette to Ishpeming, and in the office of the Pittsburgh & Lake Angeline Company, and prepared to go under ground. Mr. Kidder
360 drove me to the shaft marked on that map near the meander corner No. 16, and I went down the shaft, and there I met Captain Walters, who took me through the drifts of the mine, and showed me the direction which the ore was trending, with the possibility, or rather the probability, of its passing over the line into the property of the Cleveland Company. I think this was January 10, 1894; I have a note of it, I think. Captain Walters told me he thought there would be about 200,000 tons of ore on the Cleveland Company's side of the line. I think the developments have shown more than that in that deposit on the Cleveland side of the line. Last summer it was discovered that the deposit extended a good deal further than we first supposed. That discovery began in April, and the drifts were continued up till I think November of last year, 1896. Mr. Bradt knew of these developments or new discoveries made between April and November. He accompanied me into the mine, as had already been arranged by previous agreement. We visited the mine of both companies jointly. On July 2, 1896, he asked me to take him into the new developments towards the northwest of our workings, and I did so. He told me he was considerably surprised at the extent of our workings at that time. It was very much longer in extent when compared with the old development. It didn't show up a large quantity of ore, but the possibility of finding a large quantity of ore on the lower level showed up much larger possibilities than existed before. I had conversations with Mr. Kidder in relation to the new discoveries that I have just been describing, and as to whether our operations would endanger the safety of their railroad track built in 1895 and 1896. I couldn't say whether these talks were in August or
361 September or not. I think there were several talks; I remember one in particular, when Mr. Kidder asked me whether I thought that the workings in this new ore would endanger the railroad track constructed during the winter of 1895–'96. I told him I had doubts of it. He said he would like to know as soon as possible when that railroad track might be disturbed.

I had conversation with Mr. Kidder in the summer of 1896, relative to the subject of the lease of the right of way for a railroad

track, something more formal and fuller than the old permission that had been granted under which it was built. It must have been in June, 1896. It was a proposition if you wish to term it so. At the Salisbury mine, we needed some land owned by the Pittsburgh & Lake Angeline Company for the purpose of the working of the mine, and Mr. Kidder said that they would like some territory over on the southeast quarter of section 10, on which to place a stock pile, and railroad track, and wished, I believe, a joint agreement, a joint contract to be entered into for the purpose of leasing such portions of section 10, and giving the right of way in consideration of their giving certain land to us in 15 for the use at the Salisbury mine. That was in June, 1896.

Q. State whether or not anything was said by Mr. Kidder as to whether he wanted a more formal lease than he already had for the railroad right of way.

A. He wanted to feel certain—I don't know he said the exact words—but he wanted to feel certain that he had a definite right of way across the lake bed. I began to draw up a description of the land he wished for.

Q. What did that description cover?

A. A partial description was for three parcels of land first; those parcels were the parcels to be leased by the Lake Ange-
362 line to the Cleveland—no, I am referring to the southeast quarter of section 10—nothing to do with the Salisbury; the first was the stock-pile grounds; the second, I think, was the right of way for the track built in 1895 and 1896, as it had already been built. I got an accurate survey of the track of 1895-'6 from Mr. Bradt for the purpose of carrying out Mr. Kidder's request; and the third parcel was for the little piece of railroad track close to the southeast quarter of section 10, already built. I had a subsequent conversation with Mr. Kidder in relation to that lease he asked for. The last conversation I had with him was on September 14, 1896. I asked him if he was ready to complete the drawing up of this lease to settle the matter, and he said he was not ready. I kept a diary, and I fixed those dates from my diary notations. I have referred to the diary in reference to these subjects. He said he was not ready to close up any such arrangement. I do not remember what Mr. Kidder said, if anything, further than that. He didn't give any reason why he wasn't ready, as far as I remember. I kept all the data that Mr. Bradt gave me of the survey of the railroad track, and I looked it over and checked up the survey roughly, and found out what land he wanted, and was prepared to write out the description of land. I had a talk with the president, Mr. Mather, about giving a formal lease over the grounds, and showed the ground to him, what ground was necessary. I was on the ground with Mr. Mather after the talk with Mr. Kidder, in pursuance of a request of Mr. Kidder. I got permission from Mr. Mather to give a formal lease of it. I was waiting for Mr. Kidder.

I first became an employee of the Cleveland Iron Mining Co. the first of July, 1895, and am still its engineer.

363 Q. You have referred to numerous conversations with Mr. Kidder and Mr. Walters; in any of them did either of those gentlemen make any reference to this south boundary, the south section line of 10, as not being the boundary line?

A. Never. I never heard from anybody that it was not until the papers were served in this suit.

Q. On the occasion of this conversation on September 14, 1896, did you have a conversation with Mr. Walters and Mr. Kidder about another subject, that is to say, the question of their desiring to stop mining operations and their fear of doing so, by reason of your operations on your side of the south line of 10?

A. Yes.

Q. What was the talk?

A. It referred to the matter growing out of the trespass of January, 1896; some of the Pittsburgh & Lake Angeline ore had, as I remember, fallen over the line, and was lying loose as they reported, by a pillar of our ore, and it was to preserve this ore until the Pittsburgh & Lake Angeline Company could sink their shaft and put a drift in, and take that out, that Captain Walters wished me to make an arrangement with him and Mr. Kidder that we should leave a block of ore so as to preserve this ore for them to reach.

Q. Mr. Mills left in February, 1896; between that time and January 1, 1897, what practical duties were you performing?

A. I had no official—no exact title.

Q. I asked you, what practical duties you were performing?

A. Matters relating to mining.

Q. So that you had during that period of time really the entire charge of the mining operations of the Cleveland Company, which the agent, if there had been one at that time, would have performed?

A. As far as the mining—I would qualify that; I didn't
364 have charge, but—there was no agent between the time Mr. Mills left and January 1st. I represented the company in certain portions of the mining operations, as directed from time to time by Mr. Mather, the president, who lived in Cleveland. Such matters as leases of railroad tracks and discussions relating to trespass and all that came within my jurisdiction during that time, as they would have come in the jurisdiction of an agent if there had been one. I had nothing to do with the outside lands; simply at the mine. These matters of trespasses and acknowledgments and discussions of the location of trespasses and anything relating to all business plans that might take place, and this boundary line where mining operations were being constructed, such matters as those were in my charge practically as agent during the time I have mentioned. I did it all, except I did not have the official title. I had a little drawing of the situation of affairs at this place where Mr. Walters and Mr. Kidder were afraid our continuous operation might pull ore from their side of the line over onto our side of the line, about which we had the discussion in September, 1896.

Q. This drawing is headed "Lake Angeline deposit, vertical section, looking east, scale ten feet to the inch;" whether or not you

had such a drawing as that before you which you and Mr. Kidder and Mr. Walters jointly examined and referred to in your conversation in this talk of September, 1896?

A. I remember we sketched it out on paper in a rough way; we had no regular drawing.

Q. Was the drawing something like that?

A. I can't remember; I should think so, because I came back and made that drawing. That drawing represents the situation
365 that we were discussing. This line marked boundary represents the south line of 10; it projected downwards into the earth.

Q. And this line through the center of the west portion of this map represents a sub-level; above that is what?

A. Loose ore, belonging to the Pittsburgh & Lake Angeline Company.

Q. In the first level?

A. From their second level into our workings. Below is the Cleveland Iron Mining Company's second level.

Q. What is this, marked block of ore that must be left to support loose ore from 3,000 to 4,000 tons above, about 40 x 40 x 16 feet?

A. That is the block of ore Mr. Kidder asked that we leave as a support, and it is there yet.

Q. I call your attention to this map particularly, and ask you to describe in some way that will be intelligible what Mr. Walters and Mr. Kidder were afraid of, and what the subject of complaint was, what they wished you to do.

A. If this block of ore were not left to support from 3,000 to 4,000 tons, were not left intact, their loose ore which rested upon it would be lost, a financial loss to their company.

This loose ore came from their side of the line, from the breaking of the stope which has been mentioned, in the trespass of 1895, on the Cleveland Company's side of the section line; it has been pulled over from the Cleveland Company's side of the section line, fallen in.

Mr. HAYDEN: I offer in evidence this map.

Which was received and marked Exhibit 24; and is hereto attached.

(Here follows map marked p. 366.)

367 Q. Mr. Mills left in February, 1896; now I want to ask you as to the amount of dead work—what is called by mining men dead work—carried on on this south-side deposit which we have been talking about?

A. Without reference to the figures, I couldn't tell you the exact amount; there was considerable carried on throughout the year; in the first place, to put it briefly, Mr. Mills had decided that where—he wished a shaft sunk on this deposit, before he left, in January, 1896, and the work was carried on after he left according to his directions. In prosecuting this work, we struck some ore further in, which led us to believe that we could get enough ore for that

season's work, and possibly the next, without sinking a shaft; these drifts were extended 500 or 600 feet—I can't recall—and numerous raises were put up, and test drifts put in, occupying nearly all the time until this bill of complaint, until this suit was commenced.

Q. How many feet of electric railroad track, or haulage track, was there in this south-side deposit, including the track through the drift?

A. I think I figured up about 3,000 feet, altogether, including what Mr. Mills has stated. That constructed since Mr. Mills left is of the same character as that constructed by him during the time he was there.

Cross-examination by Mr. CLARK:

There was about 3,000 feet of track at the time this action was brought; I have not the figures with me.

Q. Then the amount of track in there was increased about ten times after Captain Mills left?

A. No, I don't think as much as that.

Q. You heard his statement that there was about 3,000
368 feet of track?

A. I am including the long drift through the rock.

Q. You include the 900 feet Captain Mills referred to?

A. Yes, sir; I include the whole drift from the north shaft, simply include the drift through the diorite, not from the north shaft, but from the north workings, that is, from the ore in the north workings, through the diorite and into this south formation; or, in other words, I include the 640 feet of drift that has been mentioned as dead work through the diorite and then drifts around through the south mine.

Q. So that there was really about 2,300 feet of drifts and of track in the south mine when this action was brought; you said that there was 3,000 feet in all; you deduct the rock cut, the railway in the rock cut?

A. Yes.

Q. Now had the work of mining and taking out of ore increased after Mr. Mills left in proportion to the amount of new track and drifts that were in there?

Mr. HOYT: I object to that as incompetent and immaterial.

A. I don't think the mining increased to any considerable extent.

Q. Had it increased in proportion to the amount and extent of track you had put in there?

Mr. HOYT: The same objection continued.

A. It had decreased in proportion to the amount of track.

Q. Take the year after Captain Mills left, the year after February, 1896, up to February, 1897, what would you say was the amount of ore that was taken out?

A. I have not the figures for that.

Q. Can you give us an estimate?

A. The figures can be obtained easily enough, but really I wouldn't like to state that from memory.

369 Q. Can you state whether there was more ore mined during that year than the year before?

A. Yes, there was more ore in the south mine, but not twice as much as the year before. I would think about 50 per cent. more; I wouldn't like to state it positively; I have not the figures, and I would not like to say.

Q. Up to what time were you managing this mine, this mining operation; down to what time, when the new manager came?

A. About the first of January, 1897, when Mr. Duncan came.

Q. Will you get the figures in regard to the mining of the ore taken out the year following 1896, so we can have them Monday morning?

A. They can be obtained.

(Cross-examination continued:)

Mr. CLARK: Did you get a statement of the shipments in that south pit for the year 1896, the amount taken out during the year 1896–'7?

A. No, I have not.

Q. Why did you not?

A. I have not been able to secure them since Saturday night at nearly six o'clock.

Q. Didn't you say you would endeavor to get the amount?

A. I said I would endeavor.

Q. Taking the year 1897, has the mining progressed in the south workings by the Cleveland Iron Mining Co. during the present year since last January?

A. Yes.

Q. And you have been the engineer who has been laying out the work there?

A. Yes.

Q. You stated that there was about 2,300 feet of lateral drifts, aside from the main drift, from the point where the main drift came through the diorite?

A. Yes.

370 Q. What portion of these additional 2,300 feet of drifts have been made since last January, the first of last January?

A. I think they were all completed before the 1st of last January.

Q. So that the work that has been done since that in that part has been simply the stoping and mining of ore and taking it out?

A. I am not quite definite whether there were any drifts in the sublevel, but I think in general terms——

Q. Were there any drifts outside of simply the ore—taken out of ore?

A. Do you mean on the main level?

Q. I mean on any of the levels.

A. I wouldn't be positive as to that, because I have not watched

the operations for the last two or three months past, closely, but I should say in general terms that is the fact.

Q. You heard Captain Mills say that the drifts driven in ore would be paid for by the ore taken out, if it is in good ore; would you agree with that opinion?

A. It would depend on the price of ore.

Q. I mean the price of ore that has been maintained since that has been opened.

Mr. DUSTIN: To that we object; there is no proof that this man knows anything about the price of ore.

Mr. HOYT: That is incompetent anyway, and immaterial.

Q. Have you any judgment about it?

A. Some of the drifts were very expensive, I wouldn't like to state.

Q. I am talking about drifts driven right in the ore; this ore is of a soft character in these openings?

A. Most of it.

Q. What I am asking is, If a drift in that ore there, a drift seven feet wide, six feet high, wouldn't the taking out of the ore in driving that drift pay for driving it?

A. I should agree with what Mr. Mills says, that it would about even up.

371 Q. Were there any drifts from the main diorite drift, any side drifts that are in rock, except the one that Mr. Bradt has described as the north cross-cut to the west from the main diorite bluff, a part of which was in diorite?

A. A number of drifts were in rock.

Q How many drifts in the other level were in the rock?

A. This is a representation, as I take it, of the main level, our second level (referring to map).

Q. Well, take the second level.

A. Well, I wouldn't like to say positively, but I should say fully half were in rock, half of all that development, either green rock or jasper.

Q. Is green rock hard rock to drift in, or easy?

A. It varies, but to a great extent it would be called a hard rock. The size of the drifts were 9 feet high by 9 feet wide; all of the drifts of the main level were 9 x 9. It is my distinct impression that about half the drifts through the mine were in rock or lean ore, and the balance in the ore that is being taken out.

Q. What do you say the driving of such drifts, say in this green rock, would cost per foot to drive them, those stoping drifts, or those drifts that you stope?

A. I suppose you understand that our main drifts had to be of such a character, and so equipped, as to permit our motor cars to go to the extreme end at all times, and the building of the motor track.

Q. I am not talking about the motor track; I am simply talking of driving the hole where you are going to build the track and put in these electrical appliances you speak of.

A. The mere expense of ore and rock would cost anywhere from $5 upwards. I wouldn't like to say the cost per foot of driving these drifts.

Q. Can you form a judgment, you are the engineer to
372 determine those things, aren't you?

A. Well, say $10 or $12 for driving the drift. You have got to take care of the rock and put in timber, or else you can't progress.

Q. I am asking now what it would cost to drive the hole into the green rock 9 feet square per foot, and take care of the rock and dump it?

A. And put in the timber?

Q. Yes, I will say that?

A. Without figuring, I may say in general terms $10 to $12.

Q. What would it cost in jasper to drive a similar drift?

A. Such jasper as that, it would be nearly as much if not more. Without going into details, I should say about the same.

These electrical appliances I have spoken of is the mode of transporting the ore over the track I have previously referred to; and electric wire to carry the power to the motor wherever it is located, to do the hauling, and a return wire as well.

Q. Do you know the cost per hundred feet of putting in that electric wire and return wire to make the circuit for hauling?

A. The figures are not impressed upon my mind.

Q. Do you know about how much it is?

A. I listened to Mr. Mills, and I thought when he gave the figures they were just about correct.

Q. As he stated it?

A. As he stated it.

Q. During this year 1897, has the work been prosecuted with as much vigor as the year before, taking out ore out of that deposit?

A. I am not able to state that; I have not watched the deposit at all closely this last year. I have been in there three or four times, for the purpose of surveying only. I know there were not as many men as before in that deposit; I noticed that after
373 the dead work ceased, about the last of November; in November and December I went there more frequently. Since the last of January I have only been there three times. I do not know how many men have been working in there since the first of January. I cannot give any judgment as to that.

Redirect examination by Mr. HAYDEN:

I did not get the information asked for by Mr. Clark as to tonnage, because after I took away the maps it was after six o'clock and I was in Marquette and I telephoned, but could not get the figures. I live in Marquette, and did not go up to Ishpeming Saturday night. Mr. Clark asked me whether the ore taken out of a drift driven in ore would pay for the cost of driving the drift. I replied that it would about pay. That would depend upon the quality of the ore taken out; I meant to say first-class ore.

Q. It is pretty hard to say where the profit of mining iron ore would come in, wouldn't it?

A. This refers to dead work in the development. What I mean is drifting a foot in first class ore would be paid for by the ore taken out in that foot of drift. But I do not mean to refer to all the drifting done through rock as well as ore. I understood Mr. Clark to mean the eastern part of the mine.

Mr. CLARK: I said the south workings, south of the diorite.

Q. Do I understand you to say there has been no development work done in the south deposit anywhere since last January?

A. I wouldn't like to state, I don't know.

374 Q. You have been asked about the slacking up of work in this deposit during this year 1897; I want to ask you whether or not the impossibility of selling ore in the market has been the cause of the slack in work there as well as everywhere, that mine and other mines this year?

A. No; I referred to the development; I said the development ceased about last November, 1896. I did not say that no development work was done during 1896. It was since November, 1896 or since January, 1897.

Q. I want to ask you a little more fully what the character of this development work is, what it means to mine this dead work that you talk about?

A. In this particular case, as the work progressed, we considered these drifts, raises, sub-levels that we are putting in would enable us not only to take out the ore above those levels, but also to facilitate the workings beneath as far as ventilation, and handling timber, and various other accommodations to the men.

Q. What does it mean to a mine, if it was development work purely what does it mean to mine?

A. It means it is the only possible way of getting the ore out.

Q. Does it constitute the mine?

A. Yes, certainly; some of these drifts we intended to last a number of years.

Q. What I ask you about is relative to some statement or admission of Mr. Walters, if any was made, regarding the life of that east end mine, as to whether it would last long?

A. He merely stated the fact which we engineers knew, that the east end deposit under the arm of the lake had a very flat dip, and that unless work was prosecuted north of the section line, all to the south might be exhausted in a short time, in a few years. That was the statement.

375 Q. There is another matter I omitted to ask you about on Saturday, that this is whether you had a conversation with Mr. Kidder on or about November 2, 1896, regarding his sending the notice which was sent in this case, by the Lake Angeline Co. to the Cleveland Co.?

A. It was on election day; I met Mr. Kidder on the street in Marquette, and went into Mr. Wilkinson's bank, and he was about to send that letter, and he turned around to me and said, "I think

Mr. Mather will be considerably surprised when he gets that letter." And then he proceeded to tell me of this suit, that was the first intimation I had received.

Q. From the conversation, whether or not the contents of the letter were explained to that extent, to show that it was the notice?

A. Yes; I know they were.

I do not know about these photographs. I was not present when they were taken, but I know the points from which they were taken; I gave directions for the taking of these pictures.

Three photographs offered in evidence and marked Exhibits 25, 26 and 27, which are to be produced by the Cleveland Iron Mining Co. at the hearing in the Supreme Court as a part of this case.

(Here follow blue prints marked pp. 376, 377, and 378.)

379 Q. Point out on this photograph, Exhibit 27, where that diorite fold ended, and show where it extended from, from what point to what point?

A. It extended from the point of view which is about that section corner, southeast section corner of 10, and extends just a little beyond the island shown here. This view is looking westward from the section corner. It is looking from a point west of that arm east; it is looking from a point near the end of the eastern arm. It was taken within a few feet of the southeast corner of section 10. The ridge of the fold extended over here, and ended at the island, the one near the railroad track; that is substantially shown on the surface, a little beyond that island.

Exhibits 25 and 26 show the southeast arm of the lake looking up the ravine, through which the stream comes into the southeast arm of the lake; they show a little south of the section line.

The diorite rock extends—I couldn't be positive, but I should say it disappears entirely between the islands marked on the map near the railroad track and the culvert, beneath the sand. The deepest point in the lake where the only water left is, is at a point just north of this culvert, where you indicate with a pencil. This railroad track, built in 1895 and 1896, is laid upon sand foundation lying over the bed of the lake, and the culvert is placed there to allow the water that may collect south of the railway tract to pass through to the pump which is situated where you point. It is a high solid embankment, 18 or 20 feet about at its highest point; the contour of the lake will show.

(Witness points out on Exhibit 27 where the point of land is northwest from meander corner 16.)

It is about midway between the shaft-house and the edge of that timber at the right hand.

Witness shown Exhibit 6*a*, and attention called to the bluff in the central ground of this picture, and stated that bluff at that point plainly exhibits the water line or shore line, that is, north of where we were discussing on Saturday; that is looking from the north

toward that land. It is about where the letter G in the word Angeline is on the map.

Q. I want you to say whether it is practically impossible to determine the shore line at this point where the south section line intersects the water on the eastern face of this arm, near meander corner 16?

380 A. I wouldn't like to question Mr. Cummings' ability to find the original shore line; I know from experience of many years—he has had more experience in that line than I have had myself. I should say it was a difficult thing to determine where the shore line is at that point. I don't know that the shore line at that point is broken down; I don't say whether it is or not. It is certainly difficult, by reason of made ground, to determine just where the shore line is; whether it would be possible or not, I would not like to say; I have not examined Mr. Cummings' work; it would be difficult for me to determine the shore line along there. I have not been acquainted with the country as long as Mr. Cummings.

Cross-examination by Mr. BALL:

Q. In drawing this map and putting these lines on the paper, how did you arrive at that meander line; in other words, did you run it on the ground or take it from some other source?

A. I platted the notes from the Government survey, and then transferred them as near as possible to the map.

Q. Did you plat them something like this Exhibit A to the bill; that is, you platted them first in this shape that I show you in Exhibit A?

A. Yes.

Q. And then from that you transferred them to this by enlargement?

A. By enlargement, or as necessary, yes. I did not run this line on the ground at all; I didn't locate the meander line on the ground.

Q. Did you find that the lines, in drawing them on the map, exactly met?

A. No, they did not.

Q. How did you make them meet?

COURT: He told us that he pro rates them.

381 Q. On some portions of your map where you have marked made ground, does that map purport to show all the made ground, or only part of it?

A. It only shows the frontage on the lake, of the made ground; how far back it extends I have not represented.

Q. By this map you mean the large map of May 1, 1897?

A. Yes.

Mr. HAYDEN: We offer in evidence the large map.

Mr. CLARK: We object to it as incompetent; it is simply a map of the water as it now is after all the changes that have taken place

for 40 years, this filling in from the different mines fronting on the water.

Mr. HAYDEN: We offer it to show the water line, among other things, as it was before the pumping was done.

Received in evidence and marked Exhibit 28. A copy of which is hereto attached.

(Here follows blue print marked p. 382.)

383 Q. I show you a hydrographic map (Def't Ex. 38) and ask you if you know for what purpose that map was made?

A. For estimating the amount of water in the lake; that the lake might be pumped out by the three companies.

Q. Was there anything further needed for it; whether or not the map was made to show the status of the two parties who were to maintain the permanent drainage after the lake was pumped out?

A. No; this shore line was not the one represented.

Q. Not the one for that purpose?

A. No; this is to illustrate the depth of the water to be pumped out. I do not know who made the soundings in the southeast arm of the lake. I understand Mr. Parnell, or his assistant, made the soundings in the other parts of the lake.

Q. Was this large map of May 1, 1897, prepared from this map I have just shown you?

A. The contour lines are, nothing else.

Q. Was it prepared from any map made by the engineers of the parties prior to the pumping out of the lake, for the purpose of determining the permanent drainage afterwards?

A. The contour of the north line plainly marked on the map of 1892 is an exact reproduction of the map of similar size to that, a survey made by the engineers of the two companies. That was made for the purpose of permanent drainage.

Mr. CLARK: I object to that as incompetent; of this map from which this is copied he has not shown any knowledge.

Mr. BALL: When were these photographs made that you have offered as to that diorite fold?

A. This photograph, Exhibit 27, was made before the lake was pumped out, I suppose in the spring of 1892, or 1891, I think it was made.

384 Q. This photograph, when you speak of what it shows as to the diorite fold, you simply refer to what the outcrops are of that diorite fold?

A. Yes.

Q. I ask you where you mean; the diorite fold is shown on the photograph; do you refer to anything except outcrops appearing upon the surface?

A. Which photographs do you allude to?

Q. Any outcrops; you say it shows the diorite fold, and where it ended I ask you, do you refer to the outcrop?

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

A. About the line of the water, yes.
Q. You refer to only the outcrop as shown on the surface?
A. In that answer that is all I refer to.

Mr. HAYDEN: I offer in evidence this map of the railroad made by Mr. Bradt, which he admitted.

Mr. CLARK: I object to that as incompetent and immaterial.

Received in evidence and marked Exhibit 29; which is hereto attached.

(Here follows blue print marked p. 385.)

386 Mr. HAYDEN: I offer the blue-print map of the same track, which has been identified.

Mr. CLARK: I object to it as immaterial.

Received in evidence and marked Exhibit 30; which is hereto attached.

(Here follow blue prints marked pp. 387 & 388.)

389 Mr. HAYDEN: I offer Mr. Bradt's letters in conjunction with these maps, which have been all identified. The letters of Mr. Bradt to James E. Jopling, dated respectively December 12, 1895, March 6, 1896, and July 15, 1896.

Mr. CLARK: We object to them as incompetent and immaterial.

Received in evidence and marked Exhibits 31, 32 and 33, and are as follows:

DEFENDANT'S EXHIBIT 31.

ISHPEMING, MICH., *Dec.* 12, 1895.

Mr. Jas. E. Jopling, Ishpeming, Mich.

DEAR SIR: I herewith hand you a sketch of the location of the new track now under construction by the P. & L. A. I. Co. The angles shown on sketch are correct within 10′, and the measurements within 1.00 ft. In the construction of the track it is possible that the center may shift one way or the other slightly, owing to the track being laid in the bed of the lake, and being somewhat longer than it should be in its position on the proper grade.

Respectfully, E. F. BRADT.

390 ANDREW YOUNGBLUTH, sworn on the part of the defendant, The Cleveland Iron Mining Company, testified as follows:

Direct examination by Mr. HAYDEN:

I am in the employ of the Cleveland Iron Mining Company, and have been since 1894.

Q. Have you here the account of the cost of the pumping Lake Angeline?

A. From that time, yes, sir.

Mr. CLARK: I object to that as immaterial and incompetent.

I have the whole account from November 1, 1894.

Q. Will you make a statement of the details so far as you have them, of the cost of pumping Lake Angeline?

A. I have a memorandum of it.

Mr. CLARK: We object to the statement as immaterial; the contract itself shows what was the cost of pumping by contract, and that is the best evidence.

A. Our contract was $31,700.00; the other expenses in connection with the pumping brought the amount up to $51,904.04.

Mr. HOYT: That was the first pumping of the lake?

A. That was the whole expense between the three companies; the expense shared by the two companies, the Cleveland Iron Mining Company, and the Lake Superior Iron Company——

Q. Was this first expense shared by the three companies you mention?

A. Yes, sir. I have the division to each of the different companies in total.

Mr. HAYDEN: Give us the totals borne by each company, of this $51,000.00.

A. I have not got the totals; the following cost of the drainage as borne by the three companies is the pumping expense
391 borne by the Cleveland Iron Mining Company, and the Lake Superior Iron Company to the extent of $16,803.45; then an item of expense borne solely by the Cleveland Iron Mining Company for sinking a caisson in the lake bottom, $190.75; the construction of the dam and the pipe line at the east end of the lake which was borne by the—the expenses paid by the Lake Superior Iron Company are not yet adjusted between the two companies, the Lake Superior Iron Company and the Cleveland Iron Mining Company, $7,590.14; which makes a grand total of $76,488.38.

Q. What portion of that did the Cleveland Iron Mining Company pay?

A. The Cleveland Iron Mining Company paid $44,149.68; the Lake Superior Iron Company, $17,147.18, and the Pittsburgh & Lake Angeline Company, $7,601.38; which makes a total of $68,898.24; to which adding the amount not adjusted, $7,590.14, makes a total of $76,488.38.

Q. Between whom is this unadjusted amount to be adjusted?

A. Between the Cleveland Iron Mining Company and the Lake Superior Iron Company.

Q. Do you know what the total cost of the equipping of that south-side deposit has been to the Cleveland Iron Mining Company?

A. From estimates made of the amount of work, we have some figures, yes, sir.

Q. What are they?

A. Something upwards of $20,000; between $20,000 and $25,000, as near as we could arrive at it from the maps.

Q. $20,000 is a minimum, is it?

A. Yes, sir.

Mr. CLARK: What equipment do you refer to?

A. In the south deposit Mr. Hayden asked for.
Q. What kind of equipment?
A. Rock drifting, and equipping the rock drifts, and ore drifts with the electric haulage tracks and wires.
392 Q. Does that include the drift through the diorite formation as well, from the north formation to the south?
A. Yes, sir.
Mr. HAYDEN: Here are some tax receipts; I wish you would see if you can identify them as the tax receipts of the Cleveland Iron Mining Company?
A. Yes, sir.

Mr. CLARK: I object to reading those; the best evidence is the tax receipt itself.
Mr. HAYDEN: We offer them in evidence; we wish this in the record to save putting in the whole; it relates to all the property over that part of the country, some thousands of acres:

CITY OF ISHPEMING, CITY TREASURER'S OFFICE.

Received of the Cleveland Iron Mining Company the sum stated below for taxes assessed upon the following-described property in said city for the year 1881: All of the east half of section 10, except that part of the same known as the Cleveland Iron Mining Company's addition to the city of Ishpeming; section 10, township 47 north, of range 27 west. Valuation, $140,000.
Then follows the extended amount of taxes, which of course is not material.
The other one is:

CITY OF ISHPEMING, CITY TREASURER'S OFFICE.

Received of the Cleveland Iron Mining Company the sum stated below for the taxes assessed upon the following-described property in the city of Ishpeming, Michigan, for the year 1895. (Then
393 follows the description of several descriptions of land not material; then the east half of section 10, township 47 north, of range 27 west, except that part of the same known as the Cleveland Iron Mining Company's addition to the city of Ishpeming; also that part known as the Cleveland Iron Mining Company's Nebraska hill location, so called. Valuation, $664,000.00; then follows the extended amount of taxes.) Paid. Gus Holmgren, city treasurer.
D. P. Dep. T.

We simply offer it to show we have paid taxes for more than fifteen years last past on the whole of this land.
Mr. CLARK: We object to the offer for that purpose as incompetent and immaterial.

Q. By the hill location is meant the residence location?
A. Yes, sir.
Q. In the north part of that section 10?
A. Yes, sir.

Cross-examination by Mr. CLARK:

Q. Hasn't the Cleveland Iron Mining Co. a mine in section 10, 47, 27, lying on the northeast quarter, the northeast quarter of that section?

A. I don't know the boundaries of the different mines, Mr. Clark.

Q. Have they not a mine that lies north of Lake Angeline and entirely separate and distinct from lots 2 and 3 and 7 of that section?

A. They have a mine on the north of Lake Angeline, but what the description of it is, and section, I don't know.

Q. Over near where your office is located, isn't it?

A. Yes, sir.

394 Q. That is the old mine that has been worked for a good many years?

A. Yes, sir. Our office is probably half a mile from Lake Angeline in a northeasterly direction. I have worked for the Cleveland Iron Mining Co. since 1894. I am simply clerk in the office and book-keeper.

CHARLES CUMMINGS, sworn as a witness on the part of the Lake Superior Iron Company, testified as follows:

Direct examination by Mr. BALL:

I live in Marquette. My business is civil engineer and surveyor. I have been engaged in that profession eight years, or a little more. I have had access to and examined the notes and the map made by George P. Cummings of the survey of Lake Angeline, made in the last week or two, this map introduced in evidence as Exhibit 2*a*. I made that from the notes of Mr. George P. Cummings, from the notes of the survey. In making this, I used the Government field-notes. I observed that the meander lines drawn around Lake Angeline did not meet, at the south meander post. I made some figures and drew a line. I took the notes of the Government survey, and by the ordinary rule for balancing errors I made another set of figures from which I drew lines, which ran continuously from one meander corner to another. In making that balance I used the minutes of the Government field-notes; George P. Cummings used the Government field-notes in running out the lines on the ground.

395 By balancing the errors, I mean a process by which lines which do not connect, as those do not, are made to strike the point at which they are aimed. We followed the rule that is stated, the proportion, in which the sum total of all the courses is to their length, the total errors are, to be applied in correcting each course. This is the map which I made. This little black line drawn around there I call the black meander line, which indicates the lines platted from the Government notes, taking the courses and distances and platting them. That inside black wavy line is a line reduced from a copy of the Lake Superior Iron Co.'s map of the

shore line made in 1892, after some filling had been done. The lighter blue lines, partially dotted and partially not, show the shore line as located by Geo. P. Cummings from his survey of Lake Angeline, just completed. The heavy blue line is the corrected meander line, corrected by proportioning the errors I have spoken of by rule, to show more clearly, as the lines are platted exactly from the Government field notes, they don't meet at the meander posts towards which they run; the object in platting the heavy blue line is to show more correctly how the meander lines would be run back from the corner towards which they run; and so corrected. These notes here called "explanations" are the explanation of what each of the lines mean on the map.

Mr. BALL: I offer the map in evidence.

Received in evidence and marked Exhibit 7*a*, and is hereto attached.

(This exhibit was not returned to the supreme court by the register of the circuit court.)

396 PETER H. PRIMEAU, sworn as a witness on the part of the complainant, testified as follows:

Direct examination by Mr. CLARK:

I am the register of the United States land office at Marquette.

Q. I show you a plat book and ask you if that is the plat book in the Marquette United States land office, and the page you are looking at is the plat of township 47 north of range 27 west, of that office.

A. Yes, sir.

Mr. CLARK: We offer the plat in evidence, and have it identified.

COURT: I suppose you do not want any marks put upon the original?

A. No, sir.

Q. I ask you if this Exhibit C offered in evidence, certified by you, is a copy of that map.

A. Yes, sir.

Mr. CLARK: We ask to substitute this copy, Exhibit C, and substitute a copy for the original, Mr. Primeau declining to allow the original to be marked.

Mr. DUSTIN: Subject to examination and correction.

COURT: O, yes.

Mr. CLARK: I also ask you to look at another map in the same book, the same township, 47–27, received with the letter of March 15, 1849, and containing the meanderings of the lake in that township, and ask you if that is on file in your office.

A. Yes, sir.

Q. And part of this plat book as it now exists?

A. Yes, sir.

Mr. CLARK: We offer it in evidence as our next exhibit; a copy of which is hereto attached.

Q. I now ask you if this paper which I show you, marked Exhibit E, if that is a true copy of the one there, and that is certified by you.
A. Yes, sir.

397 Mr. CLARK: We ask to substitute this in place of the original.

Q. Are you willing to have that original marked?
A. No, sir.

Cross-examination by Mr. HOYT:

Q. Mr. Clark has offered two copies in evidence, one of them of the original survey and, one of the field-notes. How are those copies made?
A. They were made in our office, one of them, and the other one was a lithograph.
Q. Which one was made in your office and which one was a lithograph?
A. The first one that was produced, a copy of this one.
Q. A copy of the survey was made in your office?
A. Yes, sir. I compared it very carefully with the original. I compared both of them.

THOMAS WALTERS, recalled by Mr. Clark, further testified as follows:

Mr. CLARK: We will have marked the articles of association of the Pittsburgh & Lake Angeline Iron Company, the original articles, dated the 23rd day of October, 1865, and ask you gentlemen if you will admit that these are the articles from the clerk's office?
Mr. HOYT: We will admit these.
Received in evidence and marked Exhibit L.
Mr. CLARK: Also the amended articles of the same company, dated Cleveland, May 20, 1891, filed in the office of the county clerk and recorded the second day of July, 1891.
398 Received in evidence and marked Exhibit M.
Also, renewal articles of association of the Pittsburgh & Lake Angeline Iron Company, filed and recorded in the office of the county clerk, Marquette, Michigan, dated July 13, 1895, and recorded July 15, 1895.
Received in evidence and marked Exhibit N.
Said original articles of association, dated the 23d day of October, 1865, and said amended articles of association of the said complainant company, being renewal articles of association, dated the 13th day of July, 1895, show that the said corporation complainant was duly incorporated October 23d, 1865, and that the duration of said corporation was renewed and extended for thirty years from and after the 14th day of September, 1895, by the filing of said amended

and renewal articles of association of said corporation complainant, in accordance with the provisions of the statutes of Michigan in such cases made and provided.

Q. Captain Walters, did you hear my inquiry when Captain Mills was on the stand, about a paper brought by you to him for signature, from Mr. Mather?

A. Yes, sir.

Q. What have you to say as to whether there was such a paper, and what the facts are?

Mr. BALL: We object.

A. Mr. Mills brought me such a paper and asked me——

Q. State what the paper was, and when it was?

Mr. HOYT: We object to that as incompetent and immaterial.

A. Mr. Mills wanted me to sign a paper, as I understood it, releasing all claim north of the north line of section 15–47–27; they were to release all claim on the south side of the line of 15.

399 Q. What did Captain Mills, as you recollect his statement, say about how he came to bring that?

A. Brought it by the request, as he informed me, of Mr. Mather; I told him I wasn't agent of the Lake Angeline Company.

Q. What Mather?

A. Mr. Mather, the president of the Cleveland Iron Mining Company.

Mr. HOYT: We object to all this evidence as incompetent and immaterial.

I told him that I had no right to sign a paper of that sort, and I didn't see what weight it would have, my signing of it; Mr. Mills stated to me that Mr. Mather said if I would sign that paper, it would have some weight with the directors; and I refused to sign it, because I was not able; and Mr. Kidder was in the mine at that time; I spoke to Mr. Kidder about it when he reached the office.

Mr. HAYDEN: This is all objected to as hearsay.

I don't recollect the date when he brought that paper to me; there was a paper previous to that, and I recollect more from that paper than I do from this paper; there was a reason why I should recollect the other paper, as to the date, but I couldn't swear whether it was 1891 or 1892. It was a few months after the bringing of the first paper I should think. The first paper was brought to me in 1891, and was in regard to settling the dispute on the price of ore, which I had no authority to do at that time.

Q. Now you heard the testimony of Mr. Jopling, with regard to his estimate as to the cost of driving drifts through the green rock, and jasper, such as he has described; did you hear that?

A. Yes, sir.

Q. What did you say as to his statement?

Mr. HAYDEN: We object to that.

A. I think I know something about the formation and
400 value of driving ground in there; I have never been in there for a year, but we encountered no such ground in our side that would require that price to drive.

Q. Take that kind of ground as he describes it, what would the driving of such a drift be worth?

A. We paid on our side $5.00, that is all I can tell you; $5 or $6 a foot for timbering and driving in the ground.

Q. You mean the doing of the work?

A. The labor.

Q. And the timbering itself, would you know how much that would cost per foot?

A. O, yes.

Q. How much?

A. Allow me to make a figure a moment, and I can tell you; I am basing this on our figures on our side; the cost of timber, cost of manufacturing the timber into sets, including the sills—some put in sills, and some don't; what is called a ten-inch flat timber; that is, the labor of manufacturing, including sufficient lagging, or poles, to secure the ground, $3.58, per set of five feet.

Q. Now as to the jasper he refers to, what would the cost of that be per foot, the size he stated?

A. I didn't see it, but taking the jasper to be the same character as our jasper on our side, we would drive it for $3 or $4 a foot; and the sets the same.

Q. In driving through the *the* ore, what do you say as to whether the ore taken out pays for the driving?

A. It does on the Lake Angeline side, the same character of ore; a drift of this size, a drift through solid ground and the size of timber Mr. Jopling stated here, we figure 50 tons to the set, or in other words 10 tons to a foot; and by making the estimates—that is the way I figure a good deal of my estimates, as to the amount of ground they can drive.

Q. In going through these Cleveland Iron Mining Co.'s work-
ings we were talking about, what would you say as to
401 whether the cross-drifts he has referred to were half of them in rock or not?

A. I have not been through since Captain Mills left the property, and I think you will find Captain Mills stated at that time the drifts were in ore; I should say they were, from my observation at that time.

I heard Mr. Jopling's statement as to the conversation with me, when he was on the stand. As Mr. Jopling stated, in a kind of social conversation that came up about this lawsuit, I told him I didn't feel much interested in the matter, but if it was ours we wanted it, and if it wasn't we didn't; but I thought we had ore enough to last as long as I wanted to take charge of the mine; he said he was more interested than that; he said his wife's mother had quite a block of the stock; and I said certainly he would be personally interested in it. That is about all. I have been engaged in mining on Lake Superior going on 25 years, all the time.

Cross-examination by Mr. HOYT:

Q. Do you remember having a conversation with Mr. Mills while Mr. Bradt was on the stand the other day?

A. Yes, sir.

Q. Do you remember saying to Mr. Mills that there was no necessity of proving all this question about the boundary, because you had never heard the boundary disputed; that you never claimed anything beyond the section line until the lawsuit was begun, and you recognized the boundary line?

A. I don't recollect really those exact words. I think I can give my statement that I had up to the time of the lawsuit—I don't know whether the lawsuit was mentioned or not—had observed the east and west line as much as I had on 16, which was the
402 Lake Superior property. I have no right to make a claim above that line.

Q. I am not asking you what you have a right to do; you never did make it; I am asking you what the conversation was with Mr. Mills?

A. I don't recollect that any such thing came up.

Q. Do you say that you didn't say that to Mr. Mills?

A. I don't know. I think this conversation with Mr. Mills was on Saturday of last week. I don't recollect whether I made such a statement as that to Mr. Mills on Saturday.

Q. Is your recollection of things that happened Saturday as bad as your recollection of things that happened away back in 1891?

A. It depends on circumstances.

Q. Coming to this interview with Captain Mills in the office of your company, when you say he brought a paper, did you read that paper?

A. I read part of it, just the commencement of it.

Q. What was that?

A. I couldn't recollect that.

Q. Who was present with you at that interview?

A. No one in that particular office, but the door was open and we had the book-keeper and cashier in the next office with the door open. Mr. Mills, of course, knew I was not the agent of the mine.

A. KIDDER, recalled by Mr. Clark, further testified as follows:

Q. Referring to the testimony of Captain Bacon with regard to a talk had near lot 6, do you remember that conversation, or anything about it?

A. No, I do not. I don't remember the conversation at
403 all. I do not remember any conversation with Mr. Bacon with regard to this portion of lot 6 that was deeded by the Lake Superior Iron Company to the Cleveland Iron Company, or about lot 6.

C. E. HENDRICK, sworn as a witness on the part of the defendant, The Lake Superior Iron Company, testified as follows:

Direct examination by Mr. BALL:

I live at Ishpeming. My business is mining engineer of the Lake Superior Iron Company. I have been engaged in the profession of mining engineer since October 15, 1895; during that time I have been in the employ of the Lake Superior Iron Company. I have made some measurements and levels and maps of a cross-section of Lake Angeline. This map looks like it (map shown witness). This shows a cross-section of Lake Angeline at the north and south center line of section 10.

Q. Did you make the soundings, or where did you get the information in regard to the depth of the lake?

A. In regard to the mud and depth of the water, I got it from the best information I could obtain from the records in the office, and maps in the office. I made this map accordingly. The blue color shows the water.

Mr. CLARK: The question is incompetent and immaterial; it appears that the witness has no personal knowledge of the facts sworn to.

And the dark color underneath that represents mud; the yellowish color is supposed to represent sand and gravel, and other material in the bottom of the lake;

(Here follows blue print marked p. 404.)

405 and that part of the map represents the quarter post on the south side of the section. I took the records that we have in the office for the level of the water, representing the level of 1891, and obtained also from the Cleveland Company and Mr. Jopling. This map, the surface above the level at the quarter post to be 8.31 feet. There is a monument, a post, there, placed by Mr. Cummings. I think it is what they call a toad-stool, an iron oval covering; I wouldn't be sure if there are marks on it showing what it is, but I think there are. I think my information has been that it is at the place that is regarded and represented by the company as the quarter post. It has been there since I have been there. The monument marked on the north side of the lake is simply an arbitrary point to be used, showing the shore line of the lake as it was at the time just previous to the pumping. I don't believe I could tell the distance horizontally from the shore of the lake, as shown at the water level of 1891. The height above that level was 18.64 feet.

Q. Now do you know the place where the Government meander line crosses that quarter section as surveyed by the Government surveyor?

A. Simply as platting it and measuring it from the field-notes; that is shown on this map here, at that point. I used the level to know how high it was above the water level of 1891. It is 60.98

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILM

feet high. I think it is nearly 300 feet horizontally from that shore line; I do not know exactly. There is a mark of these levels, that is, horizontally, on the right-hand side of the map, showing the levels of the different things measured. There is a white-pine stump 2 feet in diameter; that shows the level of that stump. It was still standing there. That is 13.21 feet high above the water level of 1891, according to my scale. I cannot tell how far that is from where the shore line would come, if that was the present level.

Q. Now how high above the water level of 1891 could the water rise in that lake, taking into consideration the outlet, how high could it extend above that level that you have shown there, with the outlet as it is?

A. I think it was running out of the outlet at that height, at the west end.

Map offered in evidence and marked Exhibit 8*a*, and is hereto attached.

(Here follows blue print marked p. 406.)

407 Cross-examination by Mr. CLARK:

The elevation at the point of the monument above the water level as I have placed it there is 18.64 feet. There is a filling there that the railroad tracks are now upon; the natural ground was a gradual slope; that is as much as I know about it. That lake was lowered I think at two different times at the outlet. I have been simply told that. The elevation of the south quarter post I have referred to on the map above the water level, as I have marked it here, is 8.30 feet. It has been so cut up there by the railroad tracks that go to the Lake Angeline Co.'s lake mine that I can't tell whether it has a uniform slope down to the water's edge. As near as I could determine, as the hill comes down, it appears to be a uniform slope. I think it was a little bit steeper from that point down than it was on the hill as I have indicated, pretty nearly a uniform slope. That map is drawn to a scale; the scale is shown upon it.

F. P. MILLS, recalled by Mr. Hoyt, further testified as follows:

I heard the testimony of Captain Walters this morning, in regard to a purported interview I had with him in 1891, or thereabouts, in the office of the Lake Angeline Co. Mr. Mather never sent me any such paper as Captain Walters mentioned. I know nothing of such an interview, and it absolutely didn't take place. I never submitted to him any such paper, or mentioned it to him in any way. I never had anything to do with reference to the boundaries between the Lake Angeline Co. from the time I started to work for the
408 Cleveland until I left. The question never came up. During the progress of this trial I had a conversation with Captain Walters. It occurred last Saturday.

Q. What was said at that interview?

Mr. RUSSELL: I object to that upon the ground I mentioned before, that all things in the trial are to be referred to a point an-

terior to the commencement of the suit, and that casual conversations at the trial cannot be put in; it is incompetent and irrelevant.

A. I was talking with the Captain, and stated to him that he never had any question in reference to that line, and asked him what he meant by the question of Mr. Clark; I said that it was funny that the question never came up; I was trying to find out what he meant by it, and he said that of course "we always recognize that boundary."

Mr. HOYT: Who do you mean by we?

A. The Lake Angeline; and he stated they were recognizing it now, and were going to continue to recognize it until they knew different.

ANDREW YOUNGBLUTH, recalled by Mr. Hayden, further testified as follows:

I have heard Captain Walters' statement relative to his estimate of the cost of that rock drift.

Q. Have you any figures showing what the actual cost of that rock drift was, for any period of the time of its prosecution?

Mr. CLARK: I object to the question as incompetent; he does not claim to be a miner, nothing but a clerk in the office.

A. I have a statement covering two months during that work, that was taken from the pay-rolls.

409 Mr. HAYDEN: Do your figures show the actual total cost for those two months?

A. As far as the drifting is concerned.

Mr. CLARK: I object to that as incompetent and immaterial.

Mr. HAYDEN: What was the cost of those two months per foot?

A. The cost for the month of June, 1894, $17.04.

Q. What was the cost per foot; have you figured it up?

A. That was the cost for June, and $17.47 per foot for July.

DEFENDANT'S EXHIBIT 4.

This agreement, made this seventh day of March, A. D. 1892, by and between B. C. Howell, of the city and State of New York, party of the first part, and the Cleveland Iron Mining Company, a corporation duly organized under the laws of the State of Michigan, party of the second part,

Witnesseth: That in consideration of the covenants and agreements to be performed by the said second party, hereinafter contained, the said first party hereby agrees and covenants to and with said second party as follows:

First. To ship to, and suitably set up in a proper scow on or in Lake Angeline, county of Marquette, State of Michigan, a twenty (20) inch centrifugal pump, placing the same in a suitable position to rapidly and expeditiously drain the lake of the water therein

into the outlet thereof, together with all suitable attachments and connections, said pump to be attached direct to an engine
410 crank shaft of an Ericsson compound surface condensing engine, together with a boiler of sufficient capacity to successfully and economically operate said engine and furnish sufficient power to continuously and successfully operate said pump to its full capacity, together with all necessary appliances and connections; said engine, boiler, pump and apparatus to be erected on a well-constructed timber scow and covered with a proper and convenient boiler-house, so as to protect the same from the weather, said scow being built on a sufficient timber crib, all of the same, to wit: said pump, engine, boiler, scow and crib, and all appliances connected therewith, to be constructed of first-class materials, and in the most approved manner, to successfully and expeditiously drain out of the said Lake Angeline the water therein.

Second. To erect said pump, engine and apparatus, as soon as possible after the date of this contract, and to, immediately on the erection and completion of the same, begin the drainage of said Lake Angeline, and continue it until the water of said lake is completely pumped out, hereby agreeing and guaranteeing to pump out the water of said Lake Angeline on or before the expiration of five (5) months from the date of this contract, to wit: on or before the seventh day of August, A. D. 1892, and as much sooner as, by the exercise of due diligence, it can be done, strikes and causes beyond the control of said first party only excepted.

Third. Said first party further agrees to so drain the waters of said lake as that they will run through the present outlet of said lake into the Carp river, and, at his own expense, to enlarge and deepen the outlet wherever necessary and ditch the same so as to confine the overflow, and not to do any damage to the railroad
411 tracks of the Chicago & North Western Railway Company and of the Duluth, South Shore & Atlantic Railroad Company, or the railroad tracks of any other company, said first party hereby agreeing to indemnify said second party against and to be responsible for any and all damages which may result from his failure to fully perform this contract in this respect, provided that said second party shall procure the assent of the owners of the land through which said outlet runs, down to the Carp river, to such deepening and enlarging of said outlet, so that said first party can do the same without let or hindrance.

Fourth. As soon as the water in said lake is pumped out, said first party agrees, if desired by said second party, to sell and convey to said second party and its assigns, for the price hereinafter named, the said pump, engine, boiler, machinery, and apparatus, hereby giving to said second party, however, the option to, within thirty (30) days after said lake is pumped out, purchase from said first party two (2) twelve (12) inch centrifugal pumps, each with its own separate engine and attachments, without any additional cost than that hereinafter named, or to purchase, if it desires, from the said first party, two (2) fifteen (15) inch centrifugal pumps, with a separate engine for each pump, and apparatus complete, for the sum

of five thousand dollars ($5,000) in excess of the contract price hereinafter agreed to be paid by said second party. Further agreeing, that, in case said second party exercises its option, hereby granted, to take two new pumps and engines, either twelve (12) inch or fifteen (15) inch, in lieu of the twenty (20) inch centrifugal pump above described, to deliver and erect such two (2) pumps, each with its engine and attachments all complete, one on the scow above mentioned and the other on suitable and proper foundations resting on the bed of said lake, within two
412 (2) months from the time when said option is exercised, the said first party hereby guaranteeing that the boiler originally furnished by him, as above provided, to run said twenty (20) inch centrifugal pump will be of sufficient capacity to run two pumps of the capacity above named, either twelve (12) inch or fifteen (15) inch pumps, by the engines connected therewith, having sufficient boiler capacity so to do, and that said boiler, when delivered by him to said second party shall be in good condition and repair, and of such material and strength as will comply with the conditions of any law of the State of Michigan and of the United States. Further agreeing that, in case said second party elects to purchase two new pumps and apparatus, to allow the said second party the free use of said twenty (20) inch pump, engine and appliances, for the purpose of continuing the permanent drainage of said lake and keeping the same free from water until the said two (2) pumps, engines and apparatus, are completely set up as above provided and ready for operation.

In consideration of the prompt, continuous and complete performance of the covenants and agreements above contained for said first party to perform, said second party agrees with said first party as follows:

First. To pay to said first party, at Ishpeming, Michigan, as soon as said lake is completely drained out, the sum of twenty-seven thousand five hundred dollars ($27,500) in cash.

Second. That, in case said second party exercises the option above provided and requires said first party to furnish two (2) twelve (12) inch centrifugal pumps with engines and attachments, then to pay to said first party the further sum of five thousand five hundred dollars ($5,500) in cash as soon as said two (2) twelve (12)
413 inch centrifugal pumps, together with the engines belonging to the same and all appliances, are properly erected, set up and put in successful operation on the bed of said lake, for the permanent drainage thereof, amounting to the sum of thirty-three thousand dollars ($33,000) in all; and, in the event of said second party exercising its option to take the two (2) fifteen (15) inch centrifugal pumps, then to pay, as soon as the same, with their engines and all appliances are properly set up and in successful operation on the bed of said lake, the sum of ten thousand five hundred dollars ($10,500) in addition to the said sum of twenty-seven thousand five hundred dollars ($27,500) previously paid to said first party, making in all the sum of thirty-eight thousand dollars ($38,000); further agreeing, that, in the event of said second party not exercising

its option to take the two (2) pumps and engines, either twelve (12) inch or fifteen (15) inch, as above provided, it, the said second party, will either purchase from the said first party the said twenty (20) inch centrifugal pump and attachments, paying to the said second party therefor the sum of five thousand five hundred dollars ($5,500) in addition to the said sum of twenty-seven thousand five hundred dollars ($27,500) previously paid, making thirty-three thousand dollars ($33,000) in all; or said second party will allow the said first party to take and remove the pump and engine and attachments, leaving said boiler; in which last event, the said second party will pay to the said first party the sum of two thousand five hundred dollars ($2,500) in addition to the said sum of twenty-seven thousand five hundred dollars ($27,500) previously paid, making thirty thousand dollars ($30,000) in all.

It is mutually understood, by and between the parties hereto, as follows:

First. That the pumps and apparatus, engines and boiler, whether twelve (12) inch or fifteen (15) inch, or the single twenty (20) inch pump, to be furnished by said first party to said second party at its option, shall be, together with the foundations under the same, of first-class workmanship and material, furnishing abundant capacity and power to permanently drain said lake; that, in case said second party elects to take two (2) pumps and engines, whether twelve (12) inch or fifteen (15) inch the same shall be entirely new and in all respects sufficient and complete for the purposes for which they are intended, and, that, in case said second party elects to take the said twenty (20) inch pump originally used by said first party in the drainage of said lake, that the same, together with the engine, boiler and all appliances, shall be in good condition and repair, any pumps and apparatus hereby agreed to be furnished by said first party to said second party hereunder being guaranteed by him to be free and clear of any and all claims and liens of every description and nature whatsoever, the said first party hereby covenanting to convey to said second party a good and unencumbered title in and to the same and all of the same. Said first party further agreeing, in case of said second party exercising its option to buy any pump, or pumps, from him, the said first party, as above provided, to erect, over the pump, or pumps, so furnished, and the engine, or engines, and boiler connected therewith suitable wooden houses, so as to permanently protect the same from the weather.

414

Second. That in case said first party, except for the causes above excepted, fails to entirely pump out said lake within the time above limited, the said first party shall pay to the said second party for each and every day of delay in the complete pumping out of said lake after the expiration of five (5) months from the date hereof, the sum of thirty dollars ($30) per day, which shall be accepted by said second party as liquidated damages for such delay, which said liquidated damages the said second party shall have the right to deduct from the contract price above provided to be paid to said first party as aforesaid.

415

Third. It is expressly understood and agreed that, in case said second party does not exercise its option to purchase one (1) or two (2) centrifugal pumps of said first party as above provided, and prefers, instead, to use a direct-acting pump for the permanent drainage of said lake; that then and in that event the said first party will remove and take away said (20) inch centrifugal pump, engine and attachments, transferring and conveying the boiler, however, to said second party, and crediting the said second party with three thousand dollars ($3,000) on the entire contract price of the thirty-three thousand dollars ($33,000), said first party agreeing, however, to allow the said second party the free use of said twenty (20) inch centrifugal pump and apparatus until such time, not exceeding two (2) months, as it can procure and set up on the bed of Lake Angeline, ready for operation, a direct-acting pump, or pumps, for the permanent drainage of said lake.

Fourth. It is mutually understood that this contract shall extend to and be binding upon the heirs, legal representatives, successors and assigns of the respective parties hereto precisely the same as if the same had been designated by appropriate terms herein.

In witness whereof, the first party hereto has set his hand to duplicates hereof and the second party hereto has caused its corporate name to be signed by its president, and these presents to be attested by its secretary, and its corporate seal to be hereto attached, all to duplicates hereof, the day and year first above written.

B. C. HOWELL.
THE CLEVELAND IRON MINING COMPANY,
By WM. G. MATHER, *President.*

Attest: FRED A. MORSE, *Secretary.*

(Here follows blue print marked p. 416.)

417 STATE OF MICHIGAN:

In the Circuit Court for the County of Marquette. In Chancery.

PITTSBURGH & LAKE ANGELINE IRON COMPANY, Complainant,
v.
CLEVELAND IRON MINING COMPANY and LAKE SUPERIOR IRON Company, Defendants.

This is to certify that on the 26th day of July, 1897, a decree as of the 24th of July, 1897, was entered in said court in said cause in favor of the defendants in the above-entitled cause, in said court. That upon special motion and proper showing, in accordance with the provisions of act No. 186 of the public acts of the legislature of Michigan for 1895, the circuit judge of said court extended the time for making and settling the evidence in said cause, which was taken in open court, and for filing the same in said court, for four months from and after the date of entry of such decree. That the annexed and foregoing contains a substantial statement of all the

evidence taken at the hearing of said cause, including oral testimony, depositions and exhibits of all kinds, including maps, offered in evidence.

Dated this 23d day of November, 1897.

J. W. STONE,
Circuit Judge.

418 The Circuit Court for the County of Marquette. In Chancery.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY, Complainant,
vs.
CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR Iron Company, Defendants.

In disposing of this case I shall first discuss and determine the question of estoppel, for if the complainant is estopped to now set up title in itself to the lands lying north of the south line of section 10 the other questions become unimportant. Is the complainant estopped by its undisputed acts, conduct, silence, and acquiescence in the premises? The maxim that "where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who, by his own act, has occasioned the confidence and consequent injury to the other," applies, it is urged by the defendants, to the complainant here. It is urged that the complainant allowed the defendants to go on and expend large sums of money to explore for iron ore in the bed of this lake, upon the understanding that the bed of the lake north of the south line of section 10, where such exploring was done, belonged to them and not the complainant, and that the defendants would be entitled to remove the ore which should there be found; and it is said that the question here is not whether the legal title to the bed of the lake passed to the defendants by the acts which it is claimed constitute the estoppel, but that the question here is upon a bill in equity filed by the complainant for the purpose of making available to itself the benefits of the explorations and improvements which have been made by the
419 defendants, upon the understanding with the complainant that these explorations and improvements were carried on for the benefit of the defendants upon lands to which the complainant made no claim of title.

And it is urged by the defendants that for the complainant to change its position now, after the explorations and expenditures have been made and the ore discovered, by seeking to appropriate the fruits of such explorations, expenditures, and discovery, and deprive the defendants of the benefits thereof, is to work a fraud upon them which a court of equity will not help it to accomplish. It seems to be the law that a party will not be permitted to recover lands which he has encouraged another to occupy and improve, even when the encouragement was given under the influence of a mistake and in ignorance of his own better right.

2 Herman on Estoppel, sec. 954.

And cases cited in note 4.

I do not think that it is necessary to find that any actual fraud has been practiced by the complainant in order to apply the doctrine of equitable estoppel to its conduct. A party is estopped from contradicting his own representations, on the strength of which another has acted, even where such representations were made in good faith and in ignorance of the facts.

Sweezy *v.* Collins, 40 Iowa, 540.

Ignorance of the law or a mistake as to the party's rights will not protect one from a bar by estoppel, when but for such plea of ignorance the law would enforce the estoppel for acts and conduct, when to refuse to do so would be inequitable.

Tilton *v.* Nelson, 27 Barb., 595.

Storrs *v.* Barker,.6 Johns. Ch., 166.

Town *vs.* Needham, 3 Paige, 555.

420 The question is not, did the complainant practice a fraud upon the defendants in leading them to believe that it would not and did not claim any land lying north of the south line of section 10, but it seems to me rather that the question is whether the complainant would not be guilty of a fraud in making such claim, in view of all that has been said and done upon that subject, and in view of the course of dealing between the parties for years respecting that territory.

As Herman says, at section 736: "The fundamental principle upon which this doctrine is based is the equitable one, the suppression of fraud and the enforcement of honesty and fair dealing. The ground upon which a party is estopped from providing that his representations, on which another has acted, were false is that to permit it is contrary to equity and good conscience."

Again, at section 759: "If a man, either in express terms or by conduct, makes a representation to another party of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

Then again: "If a man, whatever his real meaning may be, so conduct himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."

SEC. 762: "The exclusive warrant for an equitable es-
421 toppel is that it is necessary to sustain the cause of right and justice. Where the acts and representations of a party must have influenced the other to do acts which he would not otherwise have done, and where a denial or repudiation must operate to the injury of such other party, the estoppel is created."

The above equitable doctrine is nowhere more clearly stated than by Cooley, J., in Ferguson *v.* Milliken, 42 Mich., 443: "Estoppels

rest upon the protection of equities." In many cases the word "wilful" is used, as though the representations or acts of the party must have been made wilfully or with intent to deceive. That was the term used in one of the leading cases—Pickard *v.* Seares.

In Freeman *v.* Cooke, 2 Ex., 654, Parke, B., referring to "wilfully" as used in Pickard *v.* Seares, said: "If, whatever a man's intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant that he should act upon it and he did act upon it as true, the party making the representations would be equally precluded from contesting its truth. In short, the representations are to be regarded as 'wilful' when the person making them meant them to be acted upon, or if, without regard to intention, he so conducts himself that a reasonable man would take the representations to be true, and believe it was meant he should act upon it."

See also Herman, secs. 754 and 772, on the same subject.

All that is essential is that there should be such conduct on the part of the party against whom the estoppel is alleged as would make it a fraud for him to gainsay it.

Now, apply the above rules to the conduct of the complainant in its dealings and actions with the defendants with reference to the territory lying north of the south line of section 10. Is there
122 any doubt, from the uncontradicted evidence, that in all the dealings, acts, negotiations, conversations, arrangements, and agreements, from first to last, between the parties, it was always understood that the section line was the northern limit of complainant's territory? Most certainly not. It does not meet the question to say that many of these acts of the agents or officers were not sufficient to convey title to real estate. The evidence shows that not a single act of any agent or officer of complainant relating to their dealings with defendants upon this subject was ever repudiated by the complainant; but, on the contrary, they all seem to have been acquiesced in and ratified. It is not a question of power or authority to convey lands, but it is a question as to whether complainant should now be equitably estopped from gainsaying what it has done and what it has permitted defendants to do with reference to this property in the belief that complainant laid no claim to anything north of said section line.

A brief review of some of the authorities on the subject of equitable estoppel may aid us.

In Dickinson *v.* Colgrove, 100 U. S., 578, A, the owner in fee of lands in Michigan, died in February, 1853, leaving his two children, B and C, his only heirs-at-law. On March 3d, C and her husband conveyed the lands by warranty deed to D, who put it upon record March 6, 1854, and entered into possession of them April 1st of that year. D, learning of the existence of B, and that he lived in California, wrote to him, inquiring whether he made any claim to the premises. On April 1, 1856, the latter addressed from California, to his sister, C, in Michigan, a letter wherein he said: "You can tell D for me he need not fear anything from me. * * * You can claim all there. This letter will be enough for him

423 I intended to give you and yours all my property there, and more if you need it."

The contents of that letter becoming known to D, he, for a valuable consideration and by deeds with covenants of warranty, conveyed in fee the lands to E and others, who thereunder occupied and improved them. July 9, 1865, B conveyed the undivided one-half of them by quitclaim deed to F, who, March 6, 1873, brought ejectment; held that B's letter of April 1, 1856, operated as an estoppel *in pais*, which precluded him from setting up a claim to them, and was an available defense to the action. Justice Swayne delivered the opinion of the court. He says, "The estoppel here relied upon is known as an equitable estoppel or estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. * * * This remedy is always so applied as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. * * * In Faxon *v.* Faxton, 28 Mich., 159, a mortgagee holding several mortgages prevailed on a son of the deceased morgagor, then intending to remove to a distance, to remain on the premises and support the family by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years the mortgagee proceeded to foreclose. He was held estopped by his assurances upon which the son had acted. The court said:

"The complainant may have estopped himself without any
424 positive agreement if he intentionally led the defendants to do or abstain from doing anything involving labor or expenditure to any considerable amount by giving them to understand they should be relieved from the burden of the mortgages."

In Harkness *v.* Toulmin, 25 Mich., 80, and Truesdale *v.* Ward, 24 Mich., 117, this principle was applied in the former case to the extent of destroying a chattel mortgage, and in the latter of forfeiting rights under a land contract.

There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect."

See also Kirk *v.* Hamilton, 102 U. S., 68–79; Maxwell *v.* Bay City Bridge Co., 41 Mich., 453, at pages 466 and 467; Cleveland *v.* Casgrain, 92 Mich., 139–153; McVicker *v.* Filer, 31 Mich., 304, at 308; State of Michigan *v.* F. & P. M. R. R. Co., 89 Mich., 481, at p. 487; 2 Herman on Estoppel, secs. 932, 933, 934, 935, 936, and 954; Petue *v.* Fater, 21 Wend., 172; Watson's Executors *v.* McLaren, 19 Wend., 563.

The principle invoked is that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive or such gross negli-
425 gence as to amount to constructive fraud. The owner, therefore, in such a case will not be permitted afterwards to assert his title and recover the property, at least without making compensation for improvements. It will be observed that in this case the complainant does not by its bill make any offer to reimburse defendants for improvements made on the property nor for money expended either in explorations or under the pumping contract. He that seeks equity should at least offer to do equity in his bill of complaint.

The complainant not only sets up the pumping contract in its bill of complaint as a binding and valid agreement, but it offered it in evidence as a part of its case, evidently relying upon its fairness, legality, and binding force on all of the parties interested in the subject.

As in Maxwell *v.* Bay City Bridge Co., 41 Mich., 466, so here money has been expended by defendants in reliance upon complainant's assent that it had no claim to property north of the section line.

See Manistee Manfg. Co. *v.* Cogswell, 103 Mich., 602.

Let us examine the pumping contract in the light of this case. If there was an agreement express or implied, fixing the line, in which there has been acquiescence, that is sufficient. An acquiescence under circumstances which imply an assent and which has been followed by a change in the condition of the parties made on the strength of such acquiescence is sufficient. The above-named case was reversed because the circuit judge erroneously directed a verdict for the defendant instead of submitting the question of acquiescence to the jury.

If it is conceded, as urged by complainant's counsel, that the
426 primary object of the parties in making the pumping contract was not to settle or dispose of any disputed question of riparian rights nor boundaries, still the question remains, Was it not the intention of the parties to that instrument to so apportion the cost and expense of that work as to make the south line of section 10 the boundary line?

Was not this fact, that the south line of section 10 was the boundary, made the basis of the contract in the apportionment of the expense and cost of that work? If so, was not this such an implied agreement and recognition of the line as fixed and established it within the meaning of the language of the Supreme Court in Manistee Manfg. Co. *v.* Cogswell?

Is not this a fair test to apply: Would the defendants have en-

tered into and made the pumping contract on the terms therein contained had the complainant claimed to them that it owned the territory now claimed, lying north of the south line of section 10, and that it proposed to extend its line to the so-called equitable center of the lake? Most certainly not. There is ample reason to say that defendants would never have made this agreement had the complainant informed them that it claimed to own a large part of the most valuable portion of the land in the bed of the lake north of the south line of section 10.

Judge Campbell says, in Cronin *v.* Love, 38 Mich., 385, that "Estoppels, when allowed, must be based on something else than the silent permission of improvements by a party who has not acted in bad faith or done any act which the other party had a right to regard as meant to govern his conduct."

Apply that rule to the pumping contract, so called. Was not the recognition of the south line of section 10 as the true boundary something more than silent permission of improvements? Was not this very line made the basis of the agreement? It seems
427 to me so, and it appears clear to me that it was an act on the part of the complainant which the other party had a right to regard "as meant to govern his (its) conduct."

In Bird *v.* Stark, 66 Mich., at page 656, Judge Campbell, speaking for the court, says: "It is undoubtedly true, under our decisions, that to make an arrangement less than 15 years old binding it must have been made with the understanding that it should be so regarded." Apply that test to the pumping contract. Can any fair-minded man read it without being satisfied that it was made with the understanding that the S. line of sec. 10 was to be regarded as the true line of ownership? It seems to me he cannot.

It is urged by complainant's counsel that at the date of the pumping contract all of the parties considered the questions of boundaries and riparian rights put at rest by the case of Clute *v.* Fisher, and that the doctrine of mutual mistake applies.

I do not remember a word of evidence tending to show that either of the defendants had ever heard of the case of Clute *v.* Fisher at the date of the contract, nor that there was action had by the parties in making the contract in mutual ignorance of the facts.

It is essential to the granting of relief in equity on the ground of mistake that it should appear that there was error on both sides, and the mistake alleged must be proved distinctly when not admitted.

Ludington *v.* Ford, 33 Mich., 123.

This doctrine has been repeatedly stated by the supreme court, both before and since the decision of the above-named case. The complainant therefore is in no position to invoke the aid of the court upon this ground.

Further than that, it has made no such claim in its bill of
428 complaint. The complainant actively assented to the development work of both defendants during nearly the whole

year of 1896 and long after Mr. Kidder on his own claim had learned of his so-called mistake.

A single month of such delay in the face of expensive development being carried on by the defendants would defeat the effort to profit by it in a court of equity.

As I have before said, no attempt is made in this case to impeach the pumping contract. This can only be done by a suit in equity to reform it. Over four years' acquiescence under the operation of this contract, witnessing the large expenditure of money, a complete change of the surface conditions, great changes in values by development undertaken at great hazards, seem to make the possibility of the claim of mistake in this contract improbable. Further, even in the presence of honest mistake, no court could reform such a contract without restoring the parties to their original status as to rights and benefits, and that could not be done in this case, either under the pleadings or proofs.

There is much force in the defendants' position that the complainant is estopped upon the ground that a license was given to both defendants to explore for ore for the purpose of discovering and removing ore, and upon such license a large expenditure has been made, by means of which the ore was discovered.

The license is not revocable after such expenditure and discovery of ore has been made, at least without an offer to reimburse defendants and place them in their original position. To do this would be very difficult, if not impossible, on a bill framed for that purpose.

A reference to some of the cases that discuss the doctrine of executed or irrevocable license may be profitable.

In Marble *v.* Whitney, 28 N. Y., 297, it was held that when
429 commissioners of highways had laid out a highway over premises of the plaintiff upon his personal consent that he could not revoke such consent after the road was laid out and the alteration made. And it was said: "If the commissioners act immediately on the faith of the virtual consent by laying out the road or making the alteration, he (plaintiff) will be estopped from denying the legality of the act."

In Western Union Telegraph Co. *v.* Bullard, 31 Atl. Rep., 286 (Vt.), a party had given permission to a telegraph company to construct its line in front of his land on a highway, and the company had erected its line and incurred expense, acting on his consent. It was held that his consent was irrevocable at that stage of the work; certainly without any offer to place the company *in statu quo*. "The doctrine of equitable estoppel should be applied." Many authorities are cited. In the same case this language is quoted with approval:

"Equity will decree specific performance when compensation in damages would be inadequate for the purposes of justice, and that the partial execution of a parol agreement may supply the want of a writing and withdraw the case from the operation of the statute of frauds. * * * When the revocation of a license would operate as a fraud, a chancellor will turn the licensor into a

trustee *ex male ficio* for the licensee on principles analogous to those which apply when the owner of land stands by and allows another person to make improvements on it under the belief that he will be allowed to reap the fruits of his labor and expenditure."

In National Water Works Co. *v.* Kansas City, 65 Fed. Rep., 691, the M. R'y Co. permitted a water works Co. to construct a pipe line along the right of way to which the railway company had title in fee. With the full knowledge of the railway company, the water works company expended considerable sums in the con-
430 struction of such pipe line, and continued, without interference, to use the same for a number of years in supplying a large city with water. Held, that the railway company would be estopped to revoke the license thus acted upon. In that case Justice Brewer quotes the following language with approval: "From the cases which have been cited we may deduce two things. * * * A license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor or placed, with his assent, in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule that no one can recall a promise or declaration made with a view to influence the course of another after he has acted upon it, and placed himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises, under these circumstances, to prevent the legal title from being used as a means of injustice." Justice Brewer then proceeds as follows: "There is nothing technical or arbitrary in the rule thus laid down, but it is founded on obvious principles of right and justice. It would be intolerable to permit the railway company, after assenting to the construction of this flow-line at such expense—a flow-line by which supply works were connected with the distribution of a large city—and also assenting to the use of its right of way for such a purpose for a number of years, to withdraw the assent, and treat the connection so necessary for the successful operation of the water-works system. Acts speak louder than words, so conduct is equally potent with writing, and the conduct of the railway company has been such that a court of equity would unhesitatingly say that it is estopped from asserting that it had failed to grant in the proper manner the right to such use of the right of way."

431 In Norfolk & W. R. Co. *v.* Perdue (W. Va.), 23 S. E. Rep., 755, it was held that when a party who claims to be the owner of a tract of land has notice of the fact that a railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his rights, and assists in the construction of said tunnel from its commencement until its completion and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recover-

ing in said action and may be enjoined from further prosecuting such action for damages; that when one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible. The court says: "The bill alleges that the appellee was cognizant of the manner in which appellant claimed to have acquired title to said strip of land and must be presumed to have known the land he claimed, and yet with all this knowledge he worked in silence for the company that constructed the tunnel and set up no claim to any portion of said strip until after the tunnel was completed and the railroad constructed through the same. If he had objected when the work was commenced the appellant might have made other arrangements or perhaps changed the route. Would it then be doing equity to allow the appellee to wait in silence until the road was located and the tunnel completed and then assert his claim for damages? Surely not."

Herm. Estoppel, 776, on this point thus states the law: "If a person having a right, and seeing another person about to
432 commit, or in the course of commit-ing, an act infringing upon that right, stands by in such manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term acquiescence, and in that sense it may be defined as 'quiescence' under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." In the case of Boardman *v.* R'y Co., 84 N. Y., 182, Miller, J., in the opinion of the court, says: "The principle applicable to such a case is laid down by Lord Denman in Pickard *v.* Sears, 6 Adol. & E., 174, as follows: 'The rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;'" and Miller, J., adds: "Nor is it essential to an equitable estoppel that the parties should design to mislead, and it is sufficient if his acts were calculated to mislead, and have misled, another acting upon it in good faith and exercising reasonable care." So, also, — the case of Jowers *v.* Phelps, 33 Ark., the law in regard to estoppel *in pais* is well stated by English, C. J., as follows: "Estoppels *in pais* depend upon facts which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with wilful disregard of the interests of others, induces or misleads another to conduct or dealings
433 which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and

assert his right to the detriment of the person so misled. That would be a fraud."

In Southern Marble Co. *v.* Damiel, 21 S. E. Rep., 531 (Ga.), the plaintiff brought his petition against the Southern Marble Co. to recover damages alleged to have resulted to him from the diversion of water by defendant and for injunction to prevent any further diversion. It was contended on the part of the defendant that the plaintiff was estopped from claiming damages because when the ditch was being dug he knew the purpose for which it was intended, and not only stood by and saw the work going on, but was actually employed by defendant to assist in digging the ditch and was paid for this service.

The court said: "If this be true we think the plaintiff could not afterwards complain that the ditch diverted water from his premises. It would be inequitable and unjust to allow him to recover damages for an injury resulting from this cause. He could not stand by while the ditch was being constructed at a heavy expense or aid in the digging of the ditch, receiving compensation therefor and making no objection, and then recover damages for the diversion of the water from his premises when he knew, or ought to have known, that this would be the result of the construction of the ditch. Under these facts he would be estopped from obtaining an injunction against the use of the ditch and the continuous diversion of water thereby."

In McBurm *v.* Thompson, 37 Pac. R., 57 (Oregon), riparian owners and their grantors had for eight years acquiesced in the diversion by a person who was not a riparian owner of a part of a stream, and such person had yearly aided in keeping the channel of the stream open and expended money on his farm which
434 would have been worthless without the water, and it was held that a court of equity would not enjoin a further diversion of the water at the suit of such riparian owners. The court says: "The defendants, thus encouraged by the plaintiff's voluntary acquiescence and participation in a common purpose, laid out their money and expended their labor in making homes for their families, under an obvious expectation that no obstacle would afterwards be interposed to prevent their enjoyment. The plaintiff's objection, in view of the unreasonable delay and of all the circumstances of the case, now comes too late; and under the maxim that 'he who is silent when he ought to speak shall not be heard to speak when he ought to keep silent,' he can have no standing in a court of equity to enjoin a diversion and use of the waters of a stream that he and his grantor have tacitly encouraged."

See also Flick *v.* Bell, 42 Pac. R., 813 (Cal.), and the cases there cited.

Clark *v.* Glidden, 15 Atl. Rep., 358 (Vt.).

Morton Brewing Co. *v.* Morton, 20 Atl. Rep., 286 (N. J.).

Nowlin *vs.* Whipple, 22 N. E. Rep., 669 (Ind.).

Saucer *v.* Keller, 28 N. E. Rep., 1117 (Ind.).

Appeal of Clelland, 19 Atl. Rep., 352 (Pa.).

In this case the doctrine of executed or irrevocable license is fully discussed, and many Pennsylvania cases are cited.

It seems to me useless to cite further authorities. I shall conclude by citing the case of Twin-Lick Oil Co. *v.* Maybury, 91 U. S., 592–3. That was a case in which the court estopped the complaining party from litigating a title to land valuable only for mining purposes, who had stood by and witnessed its development by defendant claiming title: "The fluctuating character and value of this class of property is remarkably illustrated in the
435 history of the production of mineral oil wells. Property worth thousands today is worth nothing tomorrow, and that which would today sell for a thousand dollars as its fair value may by the natural changes of a week or the energy and courage of a desperate enterprise in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the title to assert an ownership in such property to voluntarily await the event and then decide when the danger which is over has been at the risk of another to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement and but little change in value, the class of property considered subject to the most rapid, frequent, and violent fluctuations in value of anything known as property requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

The language of the court above quoted applies with striking force to mining property situated in this district. All of the parties to this suit realized the advisability of pumping the waters out of Lake Angeline to permit the taking of ore from beneath its bed. The complainant had felt so strongly the necessity that before the pumping contract was made Mr. Kidder, complainant's agent, considered the advisability of building a cofferdam across the southeast arm of the lake so that the water could be pumped from that portion of the arm over the deposit discovered and opened by his company. At that time no deposit of ore was known to exist north of the line anywhere near it. On March 16, 1892, the three companies joined in a petition to the common council of Ishpeming asking permission to pump dry Lake Angeline for their mutual benefit, stating therein that the three companies owned all
436 the land around the lake; that the south section line of 10 produced through the waters of the lake was the dividing line between the property of complainant and the defendant The Cleveland Iron Mining Company, where that line was produced south of the east half of 10, and between complainant and the defendant The Lake Superior Iron Company, where that line was produced south of the west half of section 10. Undoubtedly the assent of the city of Ishpeming was by all of the parties considered necessary as preliminary to the contract. The petition conclusively presupposes an understanding between the three companies prior to the filing of the petition that their respective boundaries should be recognized and acted on as therein stated.

The petition was granted by the common council March 16, 1892. On March 17, 1892, the contract was drawn, which was duly executed by the proper officers of the respective companies in the most formal manner and after the lapse of many months by the complainant.

I am aware that titles to land cannot in Michigan be maintained upon an estoppel, and where one by his conduct is precluded in law from asserting his title in property there is strictly no transmission of title; yet there is a mere technicality; the legal consequences are precisely the same, and for all practical purposes the estoppel works a conv-yance.

I shall therefore spend no time in discussing the question of whether or not the pumping contract was so executed as to convey real estate under the mining laws of this State. It is very clear to me that it was properly executed, so as to be perfectly legal and binding upon the parties for all the purposes intended. The same act and conduct that will estop an individual will estop a corporation. It was a sanction and ratification of all the steps
437 that led up to its execution. Whether referable to that pumping contract or not in explicit terms, the subsequent acts, declarations, trespass settlements, map-making, mining of ore from the triangle, obtaining of rail right of way, and other similar acts of the local officers of the complainant were done, and defendants were affected thereby, during the existence and under the apparent sanction of the pumping contract, executed in the manner stated and by the officers of the complainant duly authorized to carry out the terms of the said contract. Every act of every officer and agent of complainant in connection with the recognition of the south line of ten as its northern boundary, so far as the evidence in this case shows, has been ratified and sanctioned by the complainant. Therefore the sanction of that pumping contract extends to every act urged against the complainant company as an estoppel. All of the subsequent acts, declarations, and statements are consistent with the contract, and are characterized by it.

Many other grounds are urged by defendants' counsel as reasons why the bill of complaint should be dismissed. I am content to place my decision on the ground herein stated. The bill will be dismissed with costs to the defendants, to be taxed.

July 17, 1897.

J. W. STONE,
Circuit Judge.

438 *Decree.*

STATE OF MICHIGAN:

The Circuit Court for the County of Marquette. In Chancery.

At a session of said court held at the court-house in the city of Marquette, in said county, on the 24th day of July, in the year one thousand eight hundred and ninety-seven.

Present: Hon. John W. Stone, circuit judge.
In the case of—

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant,
v.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR Iron Company, Defendants.

This cause having been brought on for hearing upon the pleadings and proofs taken in open court, pursuant to the statute, the parties being in court by their respective counsel, and the court having heard the proofs and allegations of the parties and the arguments of counsel thereon, and it appearing to the court from such proofs that the complainant is not entitled to any portion of the bed of Lake Angeline lying north of the south line of section ten (10), in township forty-seven (47) north, of range twenty-seven (27) west, in the county of Marquette and State of Michigan, described in said bill, but is forever barred and estopped therefrom,
439 and that the said complainant is not entitled to any relief against the said defendants, or either of them, in this cause:
It is ordered, adjudged and decreed, and the court, by virtue of the authority therein vested, does hereby order, adjudge and decree that the said complainant's bill be, and the same is hereby, dismissed.

And it is further ordered that each of the said defendants recover, against the said complainant, its separate costs and charges by it in its defense in this behalf expended, to be taxed, and that the said defendants have several execution thereof.

J. W. STONE,
Circuit Judge.

Countersigned July 26, 1897.

WM. A. ROSS, *Register.*

Filed July 26, 1897.

WM. A. ROSS, *Register.*

440 STATE OF MICHIGAN:

The Circuit Court for the County of Marquette. In Chancery.

PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant,
vs.
THE LAKE SUPERIOR IRON COMPANY and THE CLEVELAND Iron Mining Company, Defendants.

And now comes the said complainant and hereby claims the benefit of an appeal to the supreme court from the decree rendered in said cause by said court upon the twenty-fourth day of July,

1897, said decree having been filed, by the direction of the judge of said court, on the 26th day of July, 1897.

Dated December 9th, 1897.

CLARK & PEARL,
Solicitors for Complainant.

To William A. Ross, register of said court.

441 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twenty-second day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Claudius B. Grant, chief justice; Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, Charles D. Long, associate justices.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant and Appellant,
vs.
LAKE SUPERIOR IRON CO. ET AL., Defendants.

This cause, coming on to be heard, is argued by counsel in part.

442 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twenty-third day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Claudius B. Grant, chief justice; Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, Charles D. Long, associate justices.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant and Appellant,
vs.
LAKE SUPERIOR IRON CO. ET AL., Defendants.

The arguments heretofore commenced herein are concluded and the cause submitted.

443 Supreme Court of Michigan.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY
vs.
THE LAKE SUPERIOR IRON COMPANY and CLEVELAND IRON MINING COMPANY.

Lake Angeline was situated on sections 10, 11, and 15, T. 47 N., R. 27 W., and was within the corporate limits of the city of Ishpeming, in Marquette county. It contained 148.61 acres within the Government meander lines. It was a mile in length east and west, and 1,690 feet in width on the center line of section 10, which is its widest point.

The lake was meandered and the courses and distances of the

meander lines of the original survey are shown by the field-notes of the United States Government surveyors. The official plat was introduced in evidence. A copy of a part of said plat, sufficient to show the location of this lake upon the sections mentioned, is herewith given. The figures on the map show the number of acres in each parcel according to the Government survey.

The three parties to this litigation own all the lands surrounding this lake; the complainant owning that part of section 15 bordering upon the lake; the defendant Cleveland Iron Mining Company owning that part of sections 10 and 11 bordering on the lake east of the center line of section 10; and the defendant Lake Superior Iron Company owning that part west of said center line. These three mining corporations have owned this land about thirty years and have been engaged in mining upon their respective properties for more than twenty years. For the sake of brevity, these companies will be designated by their initial letters.

The patent under which the C. I. M. Co. holds its title contains the following descriptions: "The east half of section ten (10) and the west half of section eleven (11) in township forty-seven (47) N., of range twenty-seven (27) W., containing 555 acres and $\frac{15}{100}$ of an acre, according to the official plat." The patents under which complainant holds title describe the land as lots two, three, four and five of section 15. The patents under which the L. S. I. Co. derive title describe the lands as lots four, five and six of section 10.

No ore was known to exist in the bed of the lake until the winter of 1886 and 1887, when the agent of the C. I. M. Co. caused three diamond-drill borings to be made through the ice into the
444 rock upon the north side of the lake, resulting in the discovery of iron ore. These borings were not upon territory now claimed by the complainant. Knowledge of this was conveyed to the complainant's agent, but doubts were expressed whether the ore extended into complainant's property.

In 1890 complainant sunk a shaft a short distance south of the south line of section 10 adjacent to the southeast arm of the lake, and in 1891 discovered good ore. Drifts were run in various directions, including one to the northwest, in order to ascertain the extent of the ore. These explorations resulted in the probability that the ore would continue northwest into section 10. This discovery was communicated to the C. I. M. Co.

In the latter part of 1892 complainant permitted the C. I. M. Co. to enter its shaft and drill holes from the south side into the territory north of the section line, and ore of good quality was found. Five holes were thus drilled.

In order to keep out the water from its mine at the southeast arm of the lake, complainant contemplated building a cofferdam across this arm and would probably have done this but for the agreement hereinafter referred to. Negotiations were soon thereafter entered into between the parties for pumping the water out of the lake. Mr. B. C. Howell had made a proposition to drain the lake by pumping for $33,000. These negotiations were evidently conducted for some time. The first writing that appears upon the subject was

a letter from complainant to the C. I. M. Co. dated at Ishpeming, March 2nd, and is as follows:

"GENTLEMEN: Providing you close by March 15th, 1892, a contract with B. C. Howell, to drain Lake Angeline for $33,000 in full, and only on completion of the work, we will pay you one-fifth ($\frac{1}{5}$) of such cost, less one-fifth ($\frac{1}{5}$) the then estimated value of such plant as becomes yours at that time.

"We also, by reason of not entering into a joint contract to keep the lake bed empty, agree that we will construct a flume to take away all drainage from our side of the section line, and maintain it until the ore on such land, situated under the lake bed, is exhausted. After that you may take the flume without charge, and care for it as you see proper.

"Yours truly, PITTSBURG & LAKE ANGELINE IRON CO.,
"By THOS. WALTERS, *Supt.*"

This proposition was indorsed as follows:

"Conditions accepted.

"CLEVELAND IRON MINING COMPANY,
"By F. P. MILLS, *Ag't.*"

Upon a petition, signed by all the parties, to the common council of the city of Ishpeming, the following ordinance was adopted on March 15th, 1892:

"An ordinance granting permission to the Cleveland Iron Mining Company, the Lake Superior Iron Company and the Pittsburg & Lake Angeline Iron Company to pump out and permanently drain Lake Angeline.

"Whereas, the Cleveland Iron Mining Company, the Lake Superior Iron Company, and the Pittsburg & Lake Angeline Iron Company, by mesne conveyances from the original patentees of the United States, severally own all the land surrounding Lake
445 Angeline, which said lake is situated within the corporate limits of the city of Ishpeming, and therefore, exclusively, severally own the bed of said lake, as follows, to wit: The said, The Cleveland Iron Mining Company, all that portion of the bed of said lake lying east of the center line of section ten (10) as projected through said lake, and north of the south line of section ten (10) and section eleven (11), township forty-seven (47) north of range twenty-seven (27) west, as so projected; the Lake Superior Iron Company, all that portion of the bed of said lake, lying west of center line of said section ten (10) and north of the south line of section ten (10) as projected through said lake; the Pittsburgh & Lake Angeline Iron Company all that portion of the bed of said lake lying south of the south line of said section ten (10) as projected through said lake and the surface right of lot six (6) of said

section ten (10) as acquired by them from the Lake Superior Iron Company.

"And whereas, the said three companies desire to pump the water out of said lake, and to permanently drain the same, in order to severally conduct mining operations on the respective portions of said lake bed belonging to each, and desire the formal permission and authority of the common council of the city of Ishpeming so to do, said lake lying and being within the corporate limits of said city;

"Therefore, be it ordained, by the common council of the city of Ishpeming,

"SECTION FIRST. That consent, permission and authority are hereby given and granted and duly vested in the said The Cleveland Iron Mining Company, the said The Lake Superior Iron Company, the said The Pittsburgh & Lake Angeline Iron Company and their respective successors and assigns, to pump out and drain away the water of the said Lake Angeline and, thereafter, to permanently drain the same and to maintain and operate the necessary machinery and pumping apparatus and appliances so to do, provided that the water pumped out of said lake and permanently drained therefrom shall be carried away through the present outlet of said lake into Carp river.

"SEC. SECOND. This ordinance shall take effect from and after the passage thereof."

The petition set forth the ordinance in full.

On the following day the parties executed an agreement, the material parts of which are as follows:

"This agreement, made this 17th day of March, A. D. 1892, by and between the Cleveland Iron Mining Company, first party, the Lake Superior Iron Company, second party, and the Pittsburg & Lake Angeline Iron Company, third party, all corporations organized under the laws of the State of Michigan, witnesseth:

"First. That whereas, the three parties to this agreement severally own all the land surrounding Lake Angeline, in the county of Marquette, State of Michigan, and, iron ore having been discovered under the bed of said lake, it has become necessary to pump out the water of said lake, and permanently thereafter drain the bed thereof, in order that each of the parties hereto may economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to.

"Second. And, whereas, one B. C. Howell, prior to the date
446 of this contract had a large pump suitable for such work and proposed to said first party to contract to pump out said lake and to sell said pump and necessary appliances, all for the sum of thirty-three thousand dollars ($33,000), provided he could begin operations immediately while firm ice remained in said lake, so as to furnish the necessary support for placing the proper timber work in position; and whereas, said first party after communicating with said second and third parties and getting their approval, has entered into a contract with the said Howell to pump out the water of said

lake and to purchase said pumping apparatus and appliances for said sum, thus making a large saving in the cost thereof, and whereas the cost of the continuous drainage of the bed of said lake, after the water thereof is pumped out, is now impossible of ascertainment, and the parties hereto are desirous of fixing the proper proportion of expense, both of the purchase of said pumping apparatus and of said pumping out of said lake and of the cost of the continuous or permanent drainage of the bed thereafter, to be borne by each, the same being for the mutual benefit of all,

"Now, therefore, the parties hereto, in consideration of the premises and mutual considerations received by each from each, the receipt of which is hereby respectively acknowledged, hereby agree as follows:

"Said first party agrees:

"First. To bear and pay eight-fifteenths ($\frac{8}{15}$) of the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake, under the arrangement with the said Howell, to wit: the sum of seventeen thousand, six hundred dollars ($17,600) and eight-fifteenths ($\frac{8}{15}$) of any additional cost which may be necessarily incurred in the premises, and will also bear and pay one-fifth ($\frac{1}{5}$) of the value of said pump and appliances, after the lake is pumped out, which one-fifth ($\frac{1}{5}$) thereof is to be deducted, as hereinafter provided, from the amount to be paid by said third party.

"Second. After said lake is once pumped out by said Howell, to maintain and operate the said pumping apparatus and plant for the continuous and permanent drainage of the bed of said lake, advancing all necessary expenses for such maintainment, operation and repairs, and, at the end of each calendar year, to pay and bear such a proportion of the cost thereof during the year preceding, as the total number of tons of ore mined and produced by said first party from that portion of the said lake bed belonging to it, during said year, bears to the total number of tons of iron produced and mined during such year by said first and second parties jointly from the bed of said lake, and further, to bear and pay two-thirds ($\frac{2}{3}$) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake."

Said second party agrees:

"First. To bear and pay four-fifteenths ($\frac{4}{15}$) of the entire cost of the purchase of said pump and apparatus, and of the pumping out of said lake under the arrangement with the said Howell, to wit: the sum of eight thousand, eight hundred dollars ($8,800), and four-fifteenths ($\frac{4}{15}$) of any additional cost which may be necessarily incurred in the premises.

"Second. To bear and pay to said first party, on settle-
447 ments to be made at the end of each calendar year, such a proportion of the entire cost of maintaining, operating and repairing the plant for the permanent drainage of said lake bed as the total number of tons of iron ore produced and mined by said second party, from that portion of the lake bed owned by it, during such year, bears to the total number of tons of iron ore produced and mined by said first party and said second party from the entire

lake bed during such year, and also to bear and pay one-third ($\frac{1}{3}$) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake."

Said third party agrees:

"First. To bear and pay three-fifteenths ($\frac{3}{15}$) of the entire cost of the account to be paid to the said Howell under the arrangement of said first party with him, to wit: three-fifteenths ($\frac{3}{15}$) of the said thirty-three thousand dollars ($33,000), namely, the sum of six thousand, six hundred dollars ($6,600), and three-fifteenths ($\frac{3}{15}$) of any additional cost which may be necessarily incurred in the premises, less one-fifth ($\frac{1}{5}$) of the value of said pump and appliances purchased from the said Howell under the arrangement with him, the value of which is to be estimated as soon as the first drainage of said lake is completed.

"Second. To erect and maintain a proper and sufficient flume, so constructed above the present water level of Lake Angeline, as to divert and carry away all the surface water or other surface drainage which would otherwise come into the present bed of said lake from all the land lying above the present water level of said lake, and south of the south line of section ten (10) as projected through said lake, and also to run into said flume any and all water which the said third party may pump from its mine or mines; which said flume said third party agrees to maintain and keep in repair and in successful operation, diverting such drainage from the bed of said lake, until the iron ore to which said third party is entitled, lying on, in, or under the portion of the bed of said lake lying south of the said south line of said section is mined and exhausted, and then, to turn over said flume in good repair to the said first and second parties hereto without charge, and to allow them thereafter to operate and maintain the same for the purpose of continuing said drainage, giving the employés of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, allowing them to make such operations in said flume and in the direction of the same, as may be necessary to successfully accomplish such drainage."

This agreement was signed, sealed with the corporate seal, and acknowledged with all the formalities of a deed. The certificates of acknowledgement stated that the president and secretary of each company acknowledged "that they duly executed the foregoing instrument for and on behalf of said corporation duly authorized thereto, and that the same is the free act and deed of said corporation and the free act and deed of themselves as such officers." The contract was carried out and the drainage completed December 24th, 1892. The total cost of draining and of keeping the water pumped out until January 1st, 1897,
448 was $76,488.38. Of this the C. I. M. Co. paid $44,149.68; the L. S. I. Co. $17,147.18; and the complainant $7,801.38. The water under the southeast arm of the lake was comparatively shallow. A vast body of mud was found in the bottom of the lake and the two defendants incurred an expense, in attempting to remove it, of $20,227.53.

After the execution of this contract, each party worked upon its own property as defined thereby. The complainant mined out all the valuable ore under the southeast arm and afterwards filled its opening with the waste rock. The L. S. I. made explorations at considerable expense and the C. I. M. Co. made the five drill holes above referred to from the complainant's mine, and ran a drift through the rock underneath the lake nearly to the south line of section 10 and, after reaching ore, ran drifts and cross-cuts with a view to determining the value of the ore and ascertaining if there was sufficient to open and equip a mine. All this involved large expense.

The section line was regarded as the line dividing these properties. Nails were driven in the timbers underground to indicate the line. In 1894 complainant made an innocent trespass north of the line, for which an amicable settlement was made. In 1896 the C. I. M. Co. trespassed upon complainant's property south of the line and amicably settled for it. Maps were frequently exchanged with each other. Complainant asked and obtained permission from the C. I. M. Co. for the construction of a railroad track north of the section line, which was constructed and has ever since been in operation by complainant. On March 21st, 1894, the C. I. M. Co. executed a lease to complainant, granting it the right to use land north of the section line for stock-pit grounds and the erection of temporary structures for mining purposes. Other acts also were done by the respective parties in recognition of the fact that the south line of section 10 was the boundary line as stated in the above agreement. This state of affairs continued until in November, 1896, when complainant served a notice upon the defendants that it claimed title to certain lands north of the section line.

One other fact should here be noticed. Complainant commenced mining on lots four and five in 1863. The hill was very near the shore of the lake and complainant dumped its waste rock into the lake and filled in several acres north of the section line. Upon this made land north of the line it erected some buildings, the most of which it removed to the south of the line in 1887. Complainant filed its bill of complaint November 23rd, 1896. Issue was duly joined, proofs taken and decree entered dismissing the bill.

GRANT, *C. J.*:

The theory of the complainant's bill is that the territory formerly covered by the waters of this lake should be divided among the shore-owners in proportion to the amount of shore frontage owned by each; that such ownership extends to the center of the lake to be equitably established by the court; and that such territory should be partitioned by convergent lines drawn from the outside limit of each frontage to a convergent point called the equitable center. To the bill is attached a map purporting to contain such equitable division.

449 The equitable center is placed a short distance east of the center line of the section and about 12.84 chains north of the

south line. To this center lines are run from the several points where the meander line crossed the south line of the section. A piece of land in the shape of an obtuse-angled triangle is thus carved out of the bed of the lake upon the southwest quarter of section 10 and contains 14.92 acres. A similar piece is carved out of the southeast quarter of section 10 and contains 10.84 acres. These pieces are claimed by the complainant, while the triangular piece between them, containing 4.05 acres, is apportioned to the L. S. I. Co. by virtue of its ownership of lot six. The southeast arm of the lake, south of the section line, contained 12.50 acres. The part between lots four and five and the south line of the section contained 5.57 acres. This apportionment, if adopted, would give the complainant the entire southeast arm of the lake and from two-thirds to three-quarters of the west arm.

The only reference made in the bill to the agreement above given, or to the action of the parties thereunder, is as follows: "And your orator further alleges that within the last four or five years, by mutual consent, your orator and the said defendants shared in the expense of pumping out and draining the said inland lake; your orator paying three-fifteenths of said expense, the defendant, The Lake Superior Iron Mining Company, four-fifteenths, and The Cleveland Iron Mining Company the balance, so that now said lake has been drained of water, except what is easily disposed of by moderate pumping."

The claim of the C. I. M. Co. is thus stated:

"(1) The patent under which the defendant, The Cleveland Iron Mining Company, claims title gave it title to the whole east half of section ten (10) to the south line thereof and complainant is barred from objecting to this claim because it has treated a body of water covering a portion of that territory as of no value and joined in the draining of the water as if the land was merely swampy ground valuable only when reclaimed and made dry land.

"(2) Because it has title by adverse possession for more than fifteen (15) years.

"(3) Because the south section line of ten (10) was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.

"(4) Because the pumping contract is an estoppel by deed against the complainant from now asserting title.

"(5) Because the complainant is estopped by matter *in pais* from asserting title to the land.

"(6) Because the complainant is estopped by its laches.

"(7) Because as a tenant of a portion of the premises in dispute complainant is estopped to deny defendant's title."

The claim of the L. S. I. Co. is thus stated:

450 "1. That there has been a practical division of the lake bed between the parties; that contracts, explorations and mining operations have been carried on on the strength of such division for many years, in which large sums of money have been expended,

without any certainty at the time of such expenditures that returns would be realized by the defendants therefrom, and that, by such division and long course of construction between the parties, the complainant is estopped to claim any portion of the lake bed lying north of the section line.

"2. That the pumping contract, executed by the several parties, under their corporate seals, and expressly providing that it shall be binding upon the successors and assigns of the several parties, making it a contract running with the land, amounts to a division of the lake bed by deed duly executed by the several parties.

"3. That the pumping contract is so entirely based upon the division of the lake bed above mentioned, and said division forms so essential a part of the contract, that, if such division be set aside or disregarded, the contract itself must fall; that in such case, not only is the agreement to continue the drainage of the lake at an end, but either party has a right to demand that the drainage of the lake must stop and the water allowed to rise to its original level—a result which, after all that has been done under the pumping contract, and in reliance upon it, would work great injustice to the defendants.

"4. That if the original division of the lake be disregarded and a new division must be made, such division must be made by the middle line or thread of the lake, in accordance with the common-law rule for division of the bed of fresh-water streams."

The situation is anomalous and the books present no similar case. In March, 1892, the parties entered into an agreement to extinguish the lake by pumping out the water, leaving the territory dry ground. They agreed upon an apportionment of expense substantially according to the territory within the lines of the Government survey. The lake no longer exists. Nearly five years after, this suit is planted upon the theory that the lake exists and that the court must make an equitable division from a common equitable center. All the parties, however, seem to have discussed the question as of a lake actually in existence.

The difficulty in apportioning the territory according to the theory of complainant is apparent from its irregular form. It seems conceded by the learned counsel for the complainant that the division according to the diagram, made a part of its bill, cannot be sustained, because they concede that it may be more equitable to divide the two arms of the lake according to the river rule, viz.: the medium *filium aquæ*.

It must also be conceded that the Cleveland Iron Mining Company under this rule would be entitled to some of the territory lying under the southeast arm of the lake south of the section line. In this territory the complainant in 1891 discovered valuable ore which it has mined through its shafts, levels and drifts. Complainant has no means of ascertaining how much ore was taken from this territory, part of which under its theory belongs to the C. I. M. Co. Part of the territory has caved in and the rest is filled with waste rock.

451 The distance from the south section corner, between sections 10 and 11, to the meander line is 125 feet. The meander line then runs from the south section line in a northwesterly direction 225 feet, and thence to the northeast. Complainant's proposed line of division upon the northeast almost entirely cuts off this frontage of the C. I. M. Co.

Another complication results from the fact that the C. I. M. Co. is the owner of a small piece of land in the southwest corner of the southeast quarter of section 10, which is 100 feet in length on the section line.

No fixed rule ever has been or ever can be laid down for the division of the territory covered by these inland lakes with their irregular shores. Each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible.

The manner in which the equitable center was established in this case appears from the testimony of one of complainant's own witnesses, Mr. Bradt, an engineer:

"Q. How did you locate your center point in the lake; what guided you? A. I refer you to Mr. Clark, our attorney.

"Q. What did he tell you to do to find that center point? A. He didn't tell me to find it; he found it himself.

"Q. How did he find it? A. You will have to ask him.

"Q. What did he tell you about that point; what information did he give you? A. He simply asked me to compute courses and distances that would converge at a point that he selected and designated.

"Q. Did he tell you the angle to make? A. No, sir.

"Q. Now, I wish you would give us just what Mr. Clark gave to you as a basis from which you did that work? A. Mr. Clark located upon the map a point that might be considered the equitable center, and I was, from that point, to compute courses and distances from the section line which would converge or meet at that point."

This same witness also admits that the apportionment on his diagram deprives the C. I. M. Co. of any frontage on the southwest shore of lot 7.

The above statement is sufficient to show the difficulty in making an equitable apportionment, and while nothing was said during the negotiations leading up to the agreement, or in the agreement itself, in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood. It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt. Complainant had discovered a mine on its territory south of the line and extending under an arm of the lake. At that time it was the only one which it was known would be benefited by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine

whether there existed under the bed of the lake ore worth mining. The contract, if valid, established the line beyond dispute.

452 The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this contract, recognized as valid and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of Clute *vs.* Fisher, 65 Mich., 48, as establishing the rule that the territory should be divided by the Government lines, and that it rested upon that case as the established law until the decision of Ice & Coal Co. *vs.* Ice & Coal Co., 102 Mich., 227, claiming that the latter overruled the former and that in making that contract there was a mutual mistake which entitles it to the relief prayed. The former case was decided in January, 1887, and the latter in June, 1894.

This claim depends upon the testimony of Mr. Kidder, the superintendent of complainant. He testified that, upon learning of the decision in Clute *vs.* Fisher, he obtained the opinion of Mr. Clark, its attorney, to the effect that the decision established the rule that the Government lines controlled; that he thereupon removed some of the buildings which complainant had erected on land made by it north of the section line on the southwest quarter; that he learned of the decision in Ice & Coal Co. *vs.* Ice & Coal Co. in the last of December, 1895; that he then applied to Mr. Clark for his opinion, which he received February 8th, 1896.

Still complainant waited nearly nine months before asserting title contrary to that defined by the contract. Upon this subject Mr. Kidder further testified:

"I accepted Mr. Clark's opinion as final on the subject so far as to govern my actions. I understood it to be only a matter of opinion. I understood it to be his opinion, but that the decision was definite by the supreme court.

"Q. So long as the matter remained in an opinion, it was a matter of doubt, wasn't it? A. Yes.

"Q. You were also aware of the fact that the courts sometimes change their opinions, were you not? A. I have very frequently thought that with reference to this very thing, the supreme court might change some time.

"Q. And rather than investigate any further, or raise any question about it, you concluded to accept the opinion as rendered by Mr. Clark, is that it? A. Yes, that is so."

In Clute *vs.* Fisher the lake contained 32.68 acres. Plaintiff owned about $\frac{3}{4}$ of the frontage. Defendant owned no land fronting upon it but claimed that the title was in the State. The question of the division of the lake was not involved. The place where the ice was cut was conceded to be in territory owned by the plaintiff unless his title was limited to the meander line. A diagram of that lake is found in 102 Mich., 231, and the issue clearly stated in the opinion of Chief Justice McGrath. An examination of the briefs shows that the question of a division among the riparian owners was not mentioned. That part of the opinion was, therefore,

453 mere dicta and was an erroneous statement of the law, as was subsequently held in the case between the ice companies.

The mere dicta in the opinions of courts are not controlling. It may, however, be conceded that the statement of the learned justice who wrote the opinion, which was concurred in by the entire court, might fairly be considered as enunciating the law in this State applicable to inland lakes of such size, while it also recognized the correct rule in larger lakes. The Supreme Court of the United States so accepted it, as is evident by their reference to it in Hardin *vs.* Jordin, 140 U. S., 398.

We will first discuss and dispose of the question raised upon the theory that complainant relied upon the decision of Clute *vs.* Fisher as an authoritative enunciation of the law in its negotiations and contract with the defendants, and that all the parties so understood it. The following then is the situation: We find that the parties in reliance upon that case entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each. Complainant made the contract with knowledge that it gained territory south of the line, known to be valuable, while it surrendered territory north of the line, not then known to possess any value. All parties are chargeable with knowledge that each was to incur risks of its own, make its own expenditures upon its own land according to the agreement, and, by reason of its expenditures and improvements, would be placed in such a position that it could not be restored to its former *statu quo*.

The anticipated result came. The explorations, expenditures and improvements were made, each company making them at its own risk. It is impossible to restore the *status quo* or to render exact justice between the parties because the data are not in existence. It is doubtful if a result approximately correct could be reached upon an accounting. It would be impossible to determine its correctness within many thousands of dollars.

The result of complainant's contention would be that, whenever any case has been overruled, every transaction or agreement based upon that decision may be set aside by the courts, if not barred by the statute of limitations. The agreements and settlements of parties, made with full knowledge of the facts and in reliance upon the law, ought to be as binding as the judgment of the court in a particular case. If ten other similar suits had been pending when Clute *vs.* Fisher was decided, and judgment had been rendered in reliance upon that decision, the courts could not now set them aside. The law is not so unstable as to permit such results. Judgments rendered and contracts made upon the faith of the law as enunciated in the decision of a court in the absence of fraud or misrepresentation must stand. When that decision is overruled, the overruling decision controls only subsequent tranactions. Such is the rule recognized by the decisions and text-writers.

"The general rule certainly is (as has been very clearly stated by the Supreme Court of the United States) that a mistake of the law

is not a ground for reforming a deed founded on such a mis-
454 take. And whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision."

Stor. Eq. Jur., sec. 116.

"Upon a close survey many, although not all of the cases in the latter predicament, will be found to have turned not upon the consideration of a mere mistake of law stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief."

Stor. Eq. Jur., sec. 120.

See also sec. 128.

Kent, the learned chancellor, said: "A subsequent decision of a higher court in a different case, giving a different exposition of a point of law from one declared and known when a settlement between parties takes place, cannot have a retrospective effect, and overturn such settlement. The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found. This case, therefore, is to be decided according to the existing state of things when the settlement in question took place."

Lion *vs.* Richmond, 2 John. Ch., 51.

An examination of the cases cited by complainant's counsel will show that there were other considerations in them beside a naked mistake of law. To analyze them would make this opinion unnecessarily long. A brief reference to two will suffice.

In Whelan's Appeal, 70 Pa. St., 410, there existed a failure to furnish evidence for which the applicant called and to which she was entitled. The court refers to the well-settled principle and says: "This doctrine, though founded on principle, and supported by authority, will not be allowed to bar the way to relief, where the party seeking to avoid the consequences of his own deed, shows that he has acted upon a want of proper knowledge which he was not able to obtain, though vigilant and diligent in his search for it, or where information to which he was entitled, and which was necessary to the formation of a correct judgment as to the performance of a proposed act by which his rights are to be effected, has been withheld from or refused to him. * * * It is certainly settled

that where, with a mistake in law there is found mixed up other ingredients, showing misrepresentations, stating that which is not true, or concealing that which ought to have been made known; where imposition, undue influence, mental incapacity or surprise are established, relief will be afforded to one who has thus been imposed upon and induced to do that which it is contrary to equity to maintain."

455 In Blakeman *vs.* Blakeman, 39 Conn., 320, petitioner purchased of defendant land including a right of way through a lane, and paid a greater price than would have been paid for the land alone. There had been an appurtenant right of way which had ceased by operation of law. The defendant represented that the way still existed and would pass by the deed. The court says: "Both parties were mistaken in relation to the fact of the existence of the way—a mutual mistake."

This case is stripped of all other circumstances. It contains no element of misrepresentation, imposition, suppression, undue influence, undue confidence, imbecility or surprise. Neither said or did anything to mislead the other. Each acted with deliberation and with complete knowledge of all the facts. The sole basis of complainant's claim is that the decision of this court, upon the faith of which the contract was made, was subsequently overruled.

We recognize the rule in Inglis *vs.* Bryant, 5 Det. Legal News, 159; 75 N. W. R., 442. We declined to reopen a chancery case where a decree had been entered in this State by mutual consent upon the faith of a decision of the supreme court of Ohio. Subsequently this court held directly to the contrary. It was decided that the consent decree, acquiesced in for three years, was conclusive upon the parties. Why should not a voluntary settlement out of court be as conclusive as the like settlement made in court?

We are therefore of the opinion that this case does not come within any exception to the rule that a mistake of law does not furnish any ground for relief.

Do the contract, settling the boundary line, and acquiescence therein and the acts done thereunder estop complainant to now assert a different line? The rule is settled by the decisions of this court that where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and parties have for any considerable time recognized them, they will be upheld though title by adverse possession could not be maintained.

Joyce *vs.* Williams, 26 Mich., 33.
Smith *vs.* Hamilton, 20 *id.*, 433.
Jones *vs.* Pashby, 67 *id.*, 459.

According to the testimony on the part of the plaintiff, there was a dispute as to the boundary line. Mr. Kidder testified that the superintendent of the C. I. M. Co. asked him for a deed of the land lying north of the section line and that he for his company declined to give it, making the same claim that he now asserts. If his testimony be true, and for this purpose the company must stand

by its own testimony, there was a dispute and it was settled by the agreement. Complainant recognized it for nearly five years and saw all these expenditures made by the defendants without protest.

Complainant, however, invokes the doctrine that title to land cannot rest on estoppel on account of the statute of frauds, and that a vote of three-fifths of the entire stock of the company is essential under the statute to convey title. The obvious reply to the first proposition is that it is also established that the statute of
456 frauds does not apply to boundary lines, and that the doctrine of estoppel will be applied to the voluntary adjustment of disputed boundaries.

Hayes *vs.* Livingston, 34 Mich., 384–380.

Under the theory of complainant corporations could not settle boundary lines without a meeting of the stockholders called to pass upon the alienation of its lands, and the doctrine of estoppel could never be applied to a boundary line between corporations or between a corporation and an individual.

So, too, in reply to the second proposition it may be said that the statute does not apply to the voluntary adjustment of these lines, but to alienation by deed of conveyance. Complainant was not alienating, dividing or selling any of its real estate within the language of the statute.

How. St., sec. 4052.

Alienation means in law a transfer of title by conveyance.

Webster.

The Century Dictionary and Cyclopedia.

The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders.

The contract was the act of the three parties to it. It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well as the defendants, paid out large sums of money under it. All are now estopped to deny its due execution and validity.

Another singular result of complainant's contention is this: The annulment of the pumping contract and the substitution by the court of another in its stead. Courts may annul contracts for fraud or mistake, but they cannot make and substitute others. Complainant did not offer by its bill to have the court fix its proportion of the cost of pumping out the water and mud from the lake nor define its position upon the contract. Upon the hearing and after proofs were in, it asked to have the court virtually set the contract aside and make another one for the parties.

The contract was a continuing one and provided for the continuance of the drainage. Can a court of equity make an agreement for the parties requiring them to keep the water of this lake pumped out and fix the amount each shall pay upon a basis which neither contemplated or assented to? Would the parties originally have entered into a contract such as the complainant now asks to be made? In the summer of 1893 the parties disagreed as to the continued liability under that clause of the contract relating to the drainage, and a claim was made against the complainant. Its superintendent replied to this claim by stating that it was under no circumstances interested in pumping out the mud and that, had such a contingency been stated in the contract, it would not have become a party to it. If complainant would not then tol-
457 erate a change in the contract contrary to its understanding, upon what reason can it now ask the court to make one for its benefit contrary to the express terms of the one the parties made?

The court must either affirm the contract in toto or wholly set it aside. The foundation of the contract was the settlement of the boundary lines and the division of the territory and apportionment of expense in accordance therewith. The court cannot set it aside as to the boundary lines and reform or remake it upon an equitable division of the territory. If set aside, the contract is at an end and the lake must be left to fill up if either refuses to enter into a new contract. The L. S. I. Co. has discovered no valuable ore. It was willing to assume risks in the hope of finding ore. Though it has found none, it does not seek to avoid its agreement. To that agreement alone it can be held.

Complainant is entirely without equity. It doubted the correctness of the rule of Clute *vs.* Fisher, and thought that a different rule might some time prevail. It was then its duty to take steps to test the question before permitting defendants to enter into a contract and explorations involving over $100,000. It should at least have informed the defendants of its claim and given them the opportunity to make a contract with that in view.

This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact that the venture proved successful after large expenditure creates no equity for this complainant. The skill, energy and money of that company developed a valuable property. It ought in justice to reap the benefit and the complainant ought to be estopped to participate in the benefit unless an unbending rule of law prevents.

Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 592.

Clegg *vs.* Edmondson, 8 Deg. M. & G., 787.

It would not have offered to bear its share of the loss if unsuccessful, nor could it have been compelled to.

Furthermore it was guilty of laches in keeping silence when it ought to have spoken. Every one is presumed to know the law. Therefore, it must be presumed to have known of the law enunciated in Ice Co. *vs.* Ice Co. It had an able attorney who keeps well

versed in the decisions of the courts of this State. Yet it waited two years and a half before asserting its claim, and still nine months after obtaining the opinion of its attorney that Clute *vs.* Fisher was no longer the law. It waited until circumstances and conditions have so changed that it is impossible to restore the *status quo.*

Decree affirmed with costs.

C. B. GRANT.
R. M. MONTGOMERY.
J. B. MOORE.
CHAS. D. LONG.
FRANK A. HOOKER.

Endorsed: Filed Sep. 20, 1898. Chas. C. Hopkins, clerk supreme court.

458 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the twentieth day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Claudius B. Grant, chief justice; Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, Charles D. Long, associate justices.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant and Appellant,
vs.
THE LAKE SUPERIOR IRON COMPANY and THE CLEVELAND IRON Mining Company, Defendants.

This cause having been brought to this court by appeal from the circuit court for the county of Marquette, in chancery, and having been argued by counsel and due deliberation had thereon, it is now ordered, adjudged, and decreed by the court that the decree of the circuit court for the county of Marquette, in chancery, dismissing the bill of complaint be, and the same is hereby, in all things affirmed.

And it is further ordered, adjudged, and decreed that the defendants do recover of and from the complainant their costs, to be taxed.

459 In the Supreme Court of the United States.

Petition of the Pittsburgh & Lake Angeline Iron Company

To Honorable John M. Harlan, associate justice of the Supreme Court of the United States, for a writ of error to the supreme court of Michigan in the case of—

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant,
vs.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR Iron Company, Defendants.

Your petitioner respectfully represents that the above cause was heard in the supreme court of Michigan on appeal from the circuit court of the county of Marquette, in chancery, and was decided within the last six months adversely to the complainant; that your petitioner was the complainant in said cause, and that it *alleged in its bill of complaint*, in the fifth paragraph of said bill of complaint, as the *ground of its suit* that it acquired *title* to land described as
460 fractional lot 5, section 15, township 47 north, range 27 west, through a *patent* from the United States Government to John Burt, dated September 3, 1853, and mesne conveyances to it; that it also acquired title to land described as fractional lots 3 and 4, in section 15, township 47 north, range 27 west, through a United States *patent* to William Pettit issued in 1853 and mesne conveyances to it, and that it also acquired title to lot 2, in said township and range, in a similar way; that said lots were surveyed by the United States Government as fractional, having a frontage on a small inland lake known as Lake Angeline.

Your petitioner further alleges that it is the owner in fee of the land under said Lake Angeline to its *center* adjoining said fractional lots *by virtue of riparian rights acquired through the said patents from the United States Government.*

Your petitioner further alleges that the defendant The Cleveland Iron Mining Company, in its *answer* to said bill of complaint, denied the said title of your petitioner to said land under said lake and *to its center*, so acquired by your petitioner from the United States Government, and the said Cleveland Iron Mining Company in its answer alleged that it is, by virtue of a United States *patent* to Lorenzo D. Burnell and mesne conveyances to it, *the owner* of a large portion of said territory *claimed* and owned by your petitioner under said lake. Your petitioner further states that the said Cleveland Iron Mining Company, denying the title of your petitioner, alleged in paragraph 4 of its said answer as follows:

"It was the intention of the Government to convey to the said "Lorenzo D. Burnell (through whose patent it claimed title) the "entire east half of section 10 and the entire west half of sec-
461 "tion 11, described in the bill, to the full extent and limit of "section line of said section as bounded on the west by the

"north and south center line of section 10, and on the east by the "north and south center line of section 11, and on the south by the "south section line of sections 10 and 11, *regardless of the meander "line of said Lake Angeline;* that it was the intention of both the "Government and the grantee under and *by virtue of the terms of "said patent* that the patentee should have *the full limit of said two "half sections as aforesaid.*"

Thus your petition-, by its said bill of complaint, alleged *ownership of about thirty acres of land* under said lake opposite its shore frontage and lying north of said south line of said section 10 and extending to the *center* of said lake so acquired by your petitioner under said patents and mesne conveyances to it from the United States Government, and now held by your petitioner as a riparian owner of the same, as above set forth. Your petitioner further alleges that the Cleveland Iron Mining Company, defendant, in its answer denied your petitioner's *ownership* of the said territory to the *center* of the said lake, and asserted *its ownership of all of the land* under the waters of said lake so claimed by your petitioner, and north of the south line of said section 10 projected east and west through said lake, and the said defendant claimed to own the same under the said patent from the United States Government issued to said Lorenzo D. Burnell and mesne conveyances to it.

Thus by the pleadings in said cause there was alleged a *conflict of title* under *conflicting patents* so held as above set forth by your petitioner and the said defendant, The Cleveland Iron Mining Company, and a *Federal question was placed in issue* by said pleadings as to which of said patents conveyed title to the land under the
462 said lake opposite said Government lots 2, 3, 4, and 5 of said section 15, in said township 47 north, range 27 west, to the *center* of said Lake Angeline, under the laws of the United States and as to the extent of such ownership.

Your petitioner further alleges that *what title* a United States land *patent conveys* and to whom it conveys when in *conflict with another patent* are questions of United States law, of which the Supreme Court of the United States has final jurisdiction, whether determined by inferior United States courts or by the supreme court of a State, and it is a Federal question when said conflicts arise under conflicting patents, and the decision of the supreme court of a State as to said conflicts may be reviewed under the 25th section of the United States Federal act, Revised Statutes of the United States, § 709, and that when the question in any court, State or Federal, is whether title to land which has once been the property of the United States has passed, and to whom, arising under *conflicting patents*, such questions must be resolved by the laws of the United States as Federal questions; and your petitioner alleges that the supreme court of Michigan erroneously held in said cause that your petitioner acquired *no title* by its United States patents and mesne conveyances to it in the land under said Lake Angeline *to its center*, and the Michigan supreme court, in its opinion in so holding, used the following language:

"The Cleveland Iron Mining Company claim title by virtue of

"the original patent. Complainant *owns no specific piece of land*
"*north of the section line, even under its own theory, which could be*
"*measured by metes and bounds.* How much, *if any*, it owned could
"be determined by agreement or the decision of the court of
"equity."

Thus, there was presented by the pleadings the Federal
463 questions whether your petitioner had acquired title to the land in question to the *center* of Lake Angeline under its waters by virtue of its United States patents, or whether the defendant The Cleveland Iron Mining Company had so acquired title, the supreme court of Michigan erroneously deciding said Federal question adverse to your petitioner, to its great damage, and *by so determining said Federal question erroneously* the supreme court of Michigan made it possible for it *to further hold* that the Michigan statute, which requires a three-fifths vote of all the stockholders in interest of a mining corporation to authorize the alienation of its mining real estate, *did not apply to this case*, as said statute applied *only to real estate title*, which said court had erroneously held your petitioner *did not acquire*. Thus it plainly appears that such erroneous holding of said Federal question by the said State court formed the *erroneous basis* upon which said State court held that said State statute as to a three-fifths vote of the stockholders in interest, as above set forth, did not apply.

Your petitioner further alleges that sections 4052 and 4053 of Howell's Annotated Statutes of Michigan forbids the sale of the real estate of a mining corporation, such as was the property in question in this case, without a vote of three-fifths in interest of the entire stock of the company, represented at some meeting of stockholders properly called for that purpose and as the statute directs. It clearly appears from the records of said cause that there was no such stockholders' meeting authorizing the conveyance of said real estate,

and if the supreme court of Michigan had not erroneously
464 decided said Federal question, namely, that your petitioner had acquired no title to the land under the said lake north of the south line of said section 10 to its *center*, no decree could have been entered in favor of said defendants and against your petitioner, as said Federal question thus erroneously determined was the *basis* of the *subsequent determination* that the said Michigan statute "*did not apply*," because your petitioner had *no title in fee to said land* under its patents to be protected by such statute.

Your petitioner further alleges that it appears by the pleadings and proofs in said cause appearing in the printed record herewith presented that the agents of the complainant, without a three-fifths vote of the stockholders in interest in said company, entered into a "pumping contract" with the defendants, which "pumping contract" the supreme court of Michigan *construed* to be a *conveyance* of complainant's rights, and the said supreme court of Michigan, *based* upon said erroneous determination as aforesaid, held that a three-fifths vote of the stockholders was not necessary to authorize the officers of the complainant company to dispose of its rights, because the complainant had *no title in fee* to the land under said

lake to *its center*, and, if any right, only some indefinite right not determined by said court.

And your petitioner further alleges that the defendant The Lake Superior Iron Company claims as against the said title of your petitioner solely on the ground that your petitioner *acquired no*
465 *title in fee under its patents*, as above set forth, and that it acquired all rights of your petitioner, if any, and whatever they might be under said "pumping contract."

Your petitioner alleges that by such erroneous determination of said *Federal question as to title under said United States conflicting patents* said Michigan supreme court committed manifest error, to the great injury of your petitioner and contrary to the laws of the United States. It therefore prays that a writ of error may be allowed by your honor in said cause, directed to the supreme court of the State of Michigan, requiring said court to certify said cause to the Supreme Court of the United States for review, to the end that said errors may be corrected, and that justice m*a*de be done.

Respectfully submitted.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
By F. O. CLARK, *Solicitor for said Company.*
ALFRED RUSSELL, *Of Counsel.*

Feb. 20, 1899.

Writ of error allowed this February 20th, 1899, with bond for costs for $500.

JOHN M. HARLAN,
Asso. Justice Sup. Ct. U. S.

[Endorsed:] 16682. Petition for allowance of writ. Filed March 15, 1899. Chas. C. Hopkins, clerk supreme court of Michigan.

466 In the Supreme Court of the United States of America.

THE PITTSBURGH AND LAKE ANGELINE Iron Company, Complainant, *vs.* THE CLEVELAND IRON MINING COMPANY and The Lake Superior Iron Company, Defendants.	Error to the Supreme Court of the State of Michigan.

Assignments of Error.

Afterwards, to wit, on the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-nine, came the said Pittsburgh and Lake Angeline Iron Company, a corporation, by F. O. Clark, its attorneys, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

1. Because, it conclusively appearing from the record in said

cause in the supreme court of Michigan that the complainant was the owner of lots two (2), three (3), four (4), and five (5) of section fifteen (15), according to United States Government survey, and that one of the defendants, The Lake Superior Iron Company, was the owner of lots four (4), five (5), and six (6), in section ten (10), and that the defendant The Cleveland Iron Mining Company was the owner of lots two (2), three (3), and seven (7), in said section ten (10), and was also the owner of lot one (1), in section eleven (11), all of the above-mentioned lots being in township forty-seven (47) north, range twenty-seven (27) west, according to United States Government survey, and whereas it conclusively appears from the said record in said cause that all of said Government lots had a frontage upon Lake Angeline, an inland lake located in said sections ten (10), eleven (11), and fifteen (15), and that all the above-mentioned lots were owned either by the complainant or one of the defendants, and that said lots entirely surround the said lake, and that the said complainant and defendants are the sole owners of all of the said territory surrounding said lake, and that whereas the complainant, by virtue of said ownership of said lots two (2), three (3), four
467 (4), and five (5) of said section fifteen (15), in its pleadings in said cause, as appears by said record, alleged riparian ownership of the land under the waters of said lake opposite the said lots two (2), three (3), four (4), and five (5) of said section fifteen (15) to the center of said lake or where the water of said lake was before the drainage of the same, and whereas the defendants denied the said ownership of the complainant to the center of said lake and claimed in their pleadings in said cause ownership to the south line of said section 10 as projected east and west through the waters of said lake, and to all the land under the waters of said lake north of the said south line of section ten (10) so projected, the complainant and the said defendants all claiming their titles to said land through separate patents from the United States Government, the supreme court of Michigan held that the defendant "The Cleveland Iron Mining "Company claimed title by virtue of the original patent. The com- "plainant *owned no specific piece of land north of the section line* (mean- "ing the said south line of section 10 so projected through the water "of the said lake as aforesaid), even under its own theory, which "could be measured by metes and bounds." Thus, the complainant alleges, said court erroneously held that the complainant acquired *no title to the land under the waters of the said inland lake* and to its center abutting its shore frontage on said lots two (2), three (3), four (4), and five (5) of said section fifteen (15) by virtue of its riparian rights as abutting owner upon the said lake, but that the defendants acquired said title, and that the Cleveland Iron Mining Company, by virtue of its conflicting patent, acquired title north of said south line of section ten (10) and east of the north and south center line of said section ten (10).

2. Because the supreme court of Michigan held, as to said territory so owned by complainant under the waters of said lake or where the waters of said lake originally were, that "how "much, if any, it owned could *only* be determined by agreement

"or by the decree of a court of equity," holding in substance
468 that the complainant never acquired title in fee to any portion of the land under the waters of said lake north of said south line of said section ten (10).

3. Because the said supreme court of Michigan, having held that the complainant acquired no title in fee in the land by virtue of its patent under the waters of said lake north of the said south line of section ten, so projected through the said lake as aforesaid, further held that the complainant not having any title in fee, but only some indefinite inchoate right, not explained by the said court, there had been by the assumed action of the officers of the complainant company, in the making of a contract known as the "pumping contract," no such alienation of land as required the vote of the stockholders of the complainant company to authorize the transfer of the title held by the complainant; and the said court further held, "The complainant was not alienating, dividing, or "selling any of its real estate within the language of the Michigan "statute. Howell's Annotated Statutes of Michigan, sec. 4052;" the court in substance holding that this was so, *because complainant had no such real estate in fee to alienate*, or any title which could be measured by metes and bounds; and the said court having determined the said *Federal question* as to title in fee acquired under conflicting United States patents adversely to the complainant, further held as to said Michigan statute of alienation as follows: "So, too, "in reply to the second proposition, it may be said that the statute "does not apply to the voluntary adjustment of these lands, but to "alienation by deed of conveyance."

4. Because the said supreme court of Michigan held "The con- "tract (referring to a pumping contract set forth in the evidence in "said cause), if valid, established the line beyond dispute."

5. Because the said supreme court of Michigan, based upon its erroneous holdings as to real-estate rights acquired under said conflicting patents, held as follows: "The following, then, is the
469 "situation: We find that the parties, in reliance on that case "(referring to the case of Clute *vs.* Fisher, 65 Mich., 48, re- "ferred to in the opinion of said court), entered into a deliberate "contract establishing their boundary lines and determining the "amount of territory belonging to each. Complainant made the "contract (referring to the said pumping contract) with knowledge "that it gained territory south of the line known to be valuable, "while it surrendered territory north of the line not then known to "possess any value."

6. Because the supreme court of Michigan held, "Explorations, "expenditures, and improvements were made, each company mak- "ing them at its own risk. It is impossible to restore the *statu quo*, "or to render exact justice between the parties, because the data are "not in existence. It is doubtful if a result approximately correct "could be reached upon an accounting. It would be impossible to "determine its correctness within many thousands of dollars."

7. Because the supreme court of Michigan held, "The *sole basis* "of complainant's claim is that the decision of this court, upon the

"faith of which contract (meaning the said pumping contract) was "made, was subsequently overruled."

8. Because the supreme court of Michigan held as follows: "Does the contract (referring to said pumping contract) settling "the boundary line and acquiescence therein and the acts done "thereunder estop the complainant to now assert a different line? "The rule is settled by the decision of this court that where dis- "puted boundary lines have been established by express agreement, "or under such circumstances that an agreement will be implied, "and parties have for any considerable time recognized them, they "will be upheld, though title by adverse possession could not be "maintained."

9. Because the supreme court of Michigan, under the issue presented by said pleadings, namely, the allegation of complainant asserting its title in fee to land to the center of said lake by virtue of its United States patent to the abutting land under the waters of said lake, and the counter-allegation of the defendant The
470 Cleveland Iron Mining Company that it acquired title to the same land under the said lake by virtue of its patent, held that "the Cleveland Iron Mining Company claimed title by "virtue of the original patent. Complainant owns no specific piece "of land north of the section line, even under its own theory, which "could be measured by metes and bounds. How much, if any, it "owned could only be determined by agreement or by a decision "of the court of equity."

Thus, as complainant alleges under said issue presented by the pleadings, a *Federal question was raised* whether the complainant had acquired title to the land in question to the center of the lake in question, or whether the defendant The Cleveland Iron Mining Company had acquired title to the same land under the waters of the said lake by virtue of a *conflicting patent*. The supreme court of Michigan *erroneously decided said Federal question adverse to the complainant*, and, *based upon* such erroneous determination of said *Federal* question, further held that the complainant having acquired no title to any specific piece of land north of the said section line, the Michigan statutes, sections 4052 and 4053 of Howell's Annotated Statutes of Michigan, which forbids the sale of real estate of a mining corporation without a vote of three-fifths in interest of the entire stock of the company represented at some meeting of stockholders properly called for the purpose of authorizing such sale, does not apply to this case, the complainant having no title in fee to protect, and because the said supreme court of Michigan based all of its holdings in said cause and discussion thereon as to the right of complainant to the territory north of the south line of said section ten upon the *fundamental erroneous holding that the complainant had acquired no title in fee to any specific piece of land north of the south line of said section ten, even under its own theory, which could be measured by metes and bounds.*

And the plaintiff in error aforesaid prays that for the errors aforesaid the judgment herein and heretofore entered in this cause in

the supreme court of Michigan may be reversed and annulled and held for naught, and that a decree be entered for the complainant.

F. O. CLARK,
Attorney for Plaintiff in Error.

[Endorsed:] # 16682. Assignments of error. Filed April 7, 1899. Chas. C. Hopkins, clerk supreme court of Michigan.

471 Know all men by these presents that we, the Pittsburgh and Lake Angeline Iron Company, as principal, and Alfred Kidder and Howard W. Kidder, as sureties, are held and firmly bound unto the Cleveland Iron Mining Company and the Lake Superior Iron Company in the full and just sum of five hundred dollars, to be paid to the said The Cleveland Iron Mining Company and the Lake Superior Iron Company and their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at Lansing, Michigan, in the supreme court of Michigan, in a suit depending in said court between The Pittsburgh and Lake Angeline Iron Company, as complainant, and The Cleveland Iron Mining Company and The Lake Superior Iron Company, defendants, a decree was rendered against the said The Pittsburgh and Lake Angeline Iron Company in the supreme court of Michigan, and the said The Pittsburgh and Lake Angeline Iron Mining Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said The Cleveland Iron Mining Company and The Lake Superior Iron Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said The Pittsburgh and Lake Angeline Iron Company shall prosecute its appeal to effect and answer all damages and costs
472 if it fail to make its plea good *good*, then the above obligation to be void; else to remain in full force and virtue.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
By ALFRED KIDDER. [SEAL.]
ALFRED KIDDER. [SEAL.]
HOWARD W. KIDDER. [SEAL.]

Sealed and delivered in presence of—
B. O. PEARL.
F. O. CLARK.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

March 13, 1899.

STATE OF MICHIGAN, } ss.
County of Marquette, }

Alfred Kidder and Howard W. Kidder, of Marquette, Marquette county, Michigan, being duly sworn, depose and say that they are worth over one thousand dollars each in property, goods, and chattels subject to execution, above all their liabilities; and the said Alfred Kidder, for himself, says that he is the agent of the Pittsburgh and Lake Angeline Iron Company, and that he signed the name of the said company to the within bond by himself, as its agent, with authority; and further says that said The Pittsburgh and Lake Angeline Iron Company is worth over one hundred thousand dollars, free and clear from all liabilities whatever.

473 ALFRED KIDDER.
HOWARD W. KIDDER.

Subscribed and sworn to before me this 4th day of March, A. D. 1899.

B. O. PEARL,
Notary Public in and for said County.

474	Pittsburgh and Lake Angeline Iron Company, complainant and appellant, *vs.* The Lake Superior Iron Company and Cleveland Iron Mining Company, defendants.	Clark & Pearl. Appeal from Marquette, in chancery. Stone, J.	Ball & Ball. Hayden & Young.

Journal.	Date.	Proceedings.
	1897.	
	Dec. 21	Proof of notice of appeal filed.
	" 22	Record on appeal filed.
	1898.	
	Feb. 16	Note of argument filed.
O, 547	Apr. 22	Argued and submitted.
" 549	" 23	Concluded and submitted.
P, 15	Sept. 20	Affirmed with costs.
	Oct. 24	Def't L. S. I. Co.'s costs taxed at $65.25.
	Dec. 24	Def't C. I. M. Co.'s costs taxed at $155.00.
	1899.	
	Mar. 15	Writ of error from Sup. Ct. U. S. received and filed.
	" 15	Petition for writ, with allowance endorsed thereon, filed.
	" 15	Bond on appeal, duly approved, filed.
	Apr. 7	Assignments of error in supreme court filed.
	" 7	Citation with proof of service filed.
	" 7	Return made to writ of error.

475 UNITED STATES OF AMERICA, *ss:*

To the Cleveland Iron Mining Company and the Lake Superior Iron Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein The Pittsburgh and Lake Angeline Iron Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 13th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

476 On this sixth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared B. O. Pearl before me, the subscriber, a notary public in and for Marquette county, Michigan, and makes oath that he delivered a true copy of the within citation to Messrs. Ball and Ball, solicitors of record for the Lake Superior Iron Company in the supreme court of Michigan, in the case mentioned in the within citation, on the 30th day of March, 1899, by handing the same to Dan. H. Ball personally, in the city of Marquette, Michigan, said Dan. H. Ball being the senior member of said firm of Ball and Ball.

B. O. PEARL.

Sworn to and subscribed the 6th day of April, A. D. 1899.

[Seal of Merwin E. Asire, Notary Public, Marquette Co., Mich.]

MERWIN E. ASIRE,
Notary Public in and for Marquette County, Michigan.

STATE OF MICHIGAN, *County of Marquette,* } *ss:*

On this sixth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared B. O. Pearl before me, the subscriber, a notary public in and for Marquette county, Michigan, and makes oath that on the 4th day of April, A. D. 1899, he delivered a true copy of the within citation to George Hayden, solicitor of record for the Cleveland Iron Mining Company, in the supreme court of Michigan, in the case mentioned in the within citation, by mailing said copy to the said George Hayden, directed to him at Ishpeming, Michigan, his place of residence, the legal postage thereon being fully prepaid; that he received in re-

turn from said George Hayden, on the 5th day of April, A. D. 1899, the acknowledgment of the receipt of said copy of said citation, signed by him on the back of a duplicate copy of the same, which duplicate copy is attached to the within citation and returned.

B. O. PEARL.

Sworn to and subscribed before me this 6th day of April, A. D. 1899.

[Seal of Merwin E. Asire, Notary Public, Marquette Co., Mich.]

MERWIN E. ASIRE,
Notary Public in and for Marquette County, Michigan.

477 UNITED STATES OF AMERICA, *ss*:

To the Cleveland Iron Mining Company and the Lake Superior Iron Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein The Pittsburgh and Lake Angeline Iron Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 13th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

478 [Endorsed:] 16682. Filed April 7, 1899. Chas. C. Hopkins, clerk supreme court of Michigan.

I, George Hayden, of Ishpeming, Marquette county, Michigan, solicitor for the Cleveland Iron Mining Company in the case of The Pittsburgh and Lake Angeline Iron Company *vs.* The Cleveland Iron Mining Company and The Lake Superior Iron Company, heard in the supreme court of the State of Michigan on appeal from the county of Marquette, Michigan, do hereby admit service upon me this 4th day of April, 1899, of a copy of a citation, of which the within is a true copy.

GEO. HAYDEN,
Solicitor for the Cleveland Iron Mining Company.

479 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pittsburgh and Lake Angeline Iron Company, complainant, and The Cleveland Iron Mining Company and The Lake Superior Iron Company, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was
480 drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said complainant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 16682. Filed March 15, 1899. Chas. C. Hopkins, clerk supreme court of Michigan.

481 Supreme Court of the State of Michigan.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, Complainant and Plaintiff in Error,
vs.
THE LAKE SUPERIOR IRON COMPANY and THE CLEVELAND IRON Mining Company, Defendants in Error.

STATE OF MICHIGAN, *In the Supreme Court,* } *ss:*

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor signed by the judges of said court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon; the petition for writ of error, the citation, with proof of service endorsed thereon; a copy of the bond to the adverse party, duly approved, filed with the writ of error, and the assignments of error in the Supreme Court of the United States.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this 7th day of April, A. D. 1899.

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No., 17,363. Michigan supreme court. Term No., 260. The Pittsburgh & Lake Angeline Iron Company, plaintiff in error, *vs.* The Cleveland Iron Mining Company & The Lake Superior Iron Company. Filed April 10th, 1899.

No. 778, 260

FILED
MAY 8 1899
JAMES H. McKENNEY

Brief of Clark & Russell for P. C.

SUPREME COURT OF THE UNITED STATES

Filed May 8, 1899.

THE PITTSBURGH and LAKE ANGELINE IRON COMPANY,
vs.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR IRON COMPANY.

778

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR COMPLAINANT

Resisting Motion to Dismiss Writ of Error.

F. O. CLARK,
Solicitor for Complainant.
ALFRED RUSSELL,
Of Counsel.

MARQUETTE:
MINING JOURNAL CO. (LIMITED), PRINTERS.
1899.

IN THE SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH and LAKE ANGELINE IRON COMPANY,
Complainant in Error,
vs.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR IRON COMPANY,
Defendants in Error.

BRIEF FOR COMPLAINANT

ON MOTION TO DISMISS WRIT OF ERROR.

I.

Notice of this motion and of the hearing on the 8th of May, 1899, was served upon us at Marquette, Michigan April 19th, 1899, as appears from the admission of service endorsed thereon. This notice was not in conformity with section 4, rule 6, which requires that it shall be served "at least three weeks before the time fixed for submitting the motion". We therefore insist that this motion is not regularly for hearing, and should not be considered by the court; and should not be considered for the further reason that the defendant has not prepared a printed record for use on this motion.

The complainant, and the defendants are mining corporations organized under the laws of Michigan operating iron mines in Marquette county in that state, in the iron district of Lake Superior. These corporations acquired title to all the government frac-

tional lots surrounding a small inland lake, which covers an area of about 150 acres, and is located in sections ten (10), eleven (11), and fifteen (15), township forty-seven (47) north, range twenty-seven (27) west, and known as Lake Angeline, and is as shown by a small sketch on page 59 of the Record in the court below; and as shown on Exhibits C and E, which are certified copies of the governmental maps, with accompanying government field notes of the meander courses and distances around the lake. The last mentioned maps, appear in said record between the pages 58 and 59. A duplicate of the first named sketch, showing the entire lake is below:

Paragraphs 5, 6, and 7 of said bill allege, that the complainant acquired title to the government lots 2, 3, 4 and 5 in said section 15, by mesne conveyance from William Pettit, John Burt and others, who were patentees from the government. William Pettit's patent of a portion of the territory was dated 1852. John Burt's patent was dated the 3rd of September, 1853. These facts are not contradicted. See pages 9 to 14 of said Record.

Defendant The Lake Superior Iron Company acquired title by mesne conveyances from Isaiah Briggs, patentee. Briggs' patent was dated May 2, 1851. See pages 1 to 5 of said Record.

The Cleveland Iron Mining Company, defendant, acquired title by mesne conveyance from Lorenzo D. Burnell, who received patent from the government July 2, 1850. See pages 5 to 7 of said Record.

The conveyances mentioned above transferred to the complainat lots 2, 3, 4 and 5 of section 15; to the defendant The Lake Superior Iron Company lots 4, 5 and 6, and the northwest quarter of the southwest quarter of section 10; to the defendant The Cleveland Iron Mining Company lots 2, 3 and 7 of the southeast quarter of section 10; and lot 1 of the southwest quarter of the southwest quarter of section 11: and the balance of the upland in the east half of 10 and the west half of 11; all in township 47 north range 27 west. These ownerships, so far as *upland* is concerned are not in dispute.

II.

Federal Questions Involved.

The complainant alleged, in the fifth paragraph of its bill of complaint, that it acquired title to the land

described as "fractional" lot 5, section 15, township 47 north, range 27 west, through a patent from the United States government issued to John Burt, dated September 3, 1853, and mesne conveyances to it. That it also acquired title to land described as "fractional" lots 3 and 4 in said section 15, issued to William Pettit by the United States government, and mesne conveyances to it. That it also acquired title to lot 2 in said township and range in similar manner from the United States government and mesne conveyance to it. That said lots were surveyed by the United States government as "fractional", and had a frontage on a small inland lake known as Lake Angeline. And that it acquired title to the centre of said lake to the land thereunder, as riparian owner, in proportion to its shore frontage. See paragraphs 5, 6, 7 of bill.

The Cleveland Iron Mining Company in its answer alleged, that it was, by virtue of a United States patent to Lorenzo D. Burnell and mesne conveyances to itself, the owner of a large portion of the said territory claimed by complainant, as riparian owner, under said lake, as alleged. The Cleveland Iron Mining Company "alleged, in paragraph four of its answer, that: "It was "the intention of the government, to convey to the said "Lorenzo D. Burnell, through whose patent it claimed "the entire east half of section 10, and the entire west "half of section 11, described in the bill, *to the full ex-"tent and limit of section* line of said section, as bound-"ed on the west by the north and south center line of section 10, and on the east by the north and south "center line of section 11, *and on the south by the south "section line of sections 10 and 11, regardless of the "meander line of said Lake Angeline.* That it was the "intention of both the government and the grantee, "under and by virtue of the terms of said patent,

"that the patentees should have the *full limit of said "two half sections, as aforesaid*".

Thus, the complainant alleged, ownership of about *thirty acres* of land formerly under the waters of said lake, opposite its shore frontage, and lying north of the south line of section 10 (if extended through the lake), as riparian owner, and that said ownership extended to the center of the lake.

The defendant, The Cleveland Iron Mining Company in its answer denied your petitioner's ownership of said territory north of the south line of section ten (10) to the center of the lake, and asserted its ownership, of all the land under the waters of the lake, claimed by the complainant, and north of the south line of section 10 projected east and west through the lake. Said defendant claiming to own the same under the Burnell patent and mesne conveyances to it as above stated. Thus, by said pleadings there was alleged conflict of title between the complainant and the defendant The Cleveland Iron Mining Company, arising under *conflicting patents* from the United States.

It will be noticed by examining the plat on page 59 of the said Record, and the one appearing in this brief, that the "east half of section 10 and the west half of section 11" as described in the Burnell patent, under which The Cleveland Iron Mining Company claimed title, would cover a large portion of the territory of the lake lying south of the center of the lake, and down to the place where the south line of section 10, if extended east and west, would pass laterally through the waters of the lake, leaving but a small portion of the lake for the complainant, as purchaser of the government lots south of the lake; in fact only a small arm thereof lying south of the south line of section 10.

Thus, title to about *thirty acres* of mining territory

under the lake from its center to the south line of section 10 projected east and west through the lake, was in dispute in said cause.

The pleadings assert conflicting ownership acquired from the government through the United States patents, and present the federal questions involved in the case, viz: did the complainant acquire title, by virtue of its ownership of said government lots 2, 3, 4 and 5, to the land under the lake and to its center, or, did The Cleveland Iron Mining Company, defendant, acquire title by virtue of its patent, to a point where the south line of section 10, if projected east and west through the waters of the lake, would run?

It appears that the patentees, through whom the complainant acquired title, received their patents, describing the lands purchased, either as lots 2, 3, 4 and 5 of section 15, or described as fractional portions of the section. In fact, the patents referred to the lots in describing them as "fractional" lots, containing a certain acreage. See pages ~~52~~ 32 to ~~57~~ 37 of said Record. Whereas, the patent to Burnell referred to, through whom the defemdant The Cleveland Iron Mining Company claims, contains the following description of the land conveyed, "the east half of section 10 and the west half of section 11, in township 47 north of range 27 west", according to the official plat of the United States government (see pages ~~57~~ 37 and ~~59~~ 39 of said Record).

Under the pleadings and proofs, with this federal question thus presented, under the issue stated, the supreme court of Michigan specifically passed upon this *fundamental federal question* in the following language: "*The Cleveland Iron Mining Company claimed* "*title by virtue of the original patent.* Complainant "*owned no specific piece of land north of the section line,* "even under its own theory, which could be measured

"by metes and bounds. How much, if any, it owned "could only be determined by agreement, or the decree "of a court of equity."

As will be noticed, this is a direct determination of the federal question involved, as to titles, acquired by conflicting patents under the laws of the United States and is not only a federal question, but a fundamental one upon which all other determinations of the court rest.

With all due respect for that distinguished court, we say its holding is erroneous, because the abutting owners either acquired title to the center of the lake, by virtue of the riparian rights appurtenant to their abutting ownership, by virtue of the law of the United States, or they did not. If they did acquire such real estate title the *limits* of the ownership could be fixed by metes and bounds; *or disputed methods of locating* those metes and bounds, could be *settled* by the judgment or decree of a court; where all disputes as to ownership must be settled either in a court of law or equity in some form, if not amicably adjusted by litigants; and the *fundamental error* of the supreme court of Michigan is, that it held, that "The Cleveland Iron Mining Company claimed title by virtue of the orig- "inal patent. Complainant *owned no specific piece of "land north of the section line,"* etc. Thus, holding title in The Cleveland Iron Mining Company, and *no title* in the complainant, as to the disputed territory. This is the real issue in this case; all other conclusions of the court rest upon it.

Counsel for the defendant, The Cleveland Iron Mining Company, present no argument and cite no authorities to show that these facts do not present a *federal* question. They confine themselves to the simple statement on page 7 of their brief, that "we do not

think any federal question exists in this case". That there is a conflict between the United States patents there is no doubt. That this conflict on this federal question was the *fundamental* controversy, as shown by pleadings and proofs there can be no doubt, and it seems clear to us that where such issues exist in the supreme court of a state, and are passed upon as the fundamental determination of the entire controversy, the right of removal to the supreme court of the United States exists, under Section 709 of the Revised Statutes of the United States, which provides: "Where "*any title, right*, privilege or immunity *is claimed* "under the constitution of any treaty or statute of or "commission held, or authority exercised under the "United States, and the decision is against the title. "right, privilege or immunity especially set up or "claimed by either party under such treaty, statute, "commission or authority, may be re-examined and re-"versed or affirmed in the supreme court upon writ of "error," etc.

The case of Shively v. Bowlby, 152 U. S. 10 is a case directly in point, as to *riparian ownership*, as well as to the right of review in the supreme court of the United States by writ of error to the supreme court of a state. In that case Mr. Justice Gray, delivering the opinion of the court, held:

"This case concerns the *title to certain lands below* "*high water mark* in the Columbia River, in the state "of Oregon. The defendant below, now plaintiff in 'error, claimed under United States, and the plaintiff "below, now defendant in error, claimed under the "state of Oregon. * * The judgment against its validity "proceeded upon the ground, that the grant from the "United States, upon which it was founded, passed "*no title* or right as against subsequent deed from the

"state *in lands below high water mark. This is a di-*
"*rect adjudication against the validity of a right or*
"*privilege, claimed under a law of the United States;*
"*and presents a federal question within the appellate*
"*jurisdiction of this court.* Revised Statutes, Sec. 709.
"That jurisdiction has been repeatedly exercised, with-
"out objection or doubt, in similar cases of writs of
"error to the state court. St. Paul & P. R. Co. v.
"Schurmeir, 71 U. S. 7 Wall. 272; Packard v. Bird,
"173 U. S. 661; Knight v. U. S. Land Association,
"142 U. S. 161. In that case the supreme court of
"Oregon held that the complainant owned no specific
"title by virtue of riparian rights." The supreme court of Michigan, as we have pointed out under similar conditions, has held the same thing in this case that *complainant "owned no specific piece of land north of the section line"* (see 76 Northwestern Reporter, page 403).

The cases are very similar, as will be noticed, and the right of review on writ of error was sustained by the supreme court of the United States.

Our claim asserted in the bill of complaint, and in the proof is, that the complainant acquired title to the land under the lake to its center, by virtue of its abutting ownership, and we not only assert this in the allegations of the bill, but in the map Exhibit A attached to the bill of complaint, and appearing between pages 24 and 25 of said record; we pointed out specifically by metes and bounds the territory claimed by complainant; and in Exhibit A we specifically point out how by convergent lines to a common center, by our theory, an equitable designation of border lines of division can be established, so as to give a relative portion of the territory formerly covered covered by the lake in proportion to shore ownership. Whether

we are right as to that, and where those lines shall *equitably* be placed is of course for the court to determine.

In the case of Murdock v. Myer and others, 87 U. S. 20 Wall, 590, and succeeding pages, it was held: "It "has been many times decided by this court, on mo- "tions to dismiss this class of cases for want of juris- "diction, that if it appears from the record that the "complainant in error *raised and presented to the court "by pleadings, prayer for instruction, or other appro- "priate method, one of the questions specified in the "statute, and the court ruled against him, the jurisdic- "tion of this court attached, and we must hear the case "on its merits.*"

Rector v. Ashley, 6 Wall. 142.
Bridge Proprietor v. Hoboken Co., 1 Wall. 116.
Fireman v. Nichol, 8 Wall. 44.
Armstrong v. Treasurer, 16 Peters 281.
Crowell v. Randall, 10 Peters, 368.

It is clear from the language of section 709 of the Revised Statutes of the United States, that the right to a writ of error from the supreme court of the United States to the supreme court of the state, exist whenever a right or title is asserted or claimed, and set up by either party under the statutes or decisions of the United States or under its authority.

"A federal question is presented, when there is in- "volved a controversy as *to riparian rights, acquired "under the laws of the United States.*" A case arises "under the laws of the United States when its correct "decision depends on the construction of the United "States law."

Cohens v. Virginia, 6 Wheat. 264, 379.

"*What a land patent conveys, is clearly a question of "United States law;* and upon this the court is to pass, "and its decision may be reviewed under the 25th sec-

"tion of the Judiciary Act. The principle has been "repeatedly recognized, 'that when the question in any "'court, *state* or federal, *is whether the title to land, which* "'*had once been the property of the United States, has* "'*passed, that question must be resolved by the laws of* "'*the United States*'."

Wilcox v. Jackson, 13 Peters 517.
Page v. Peters, 70 Wis. 182.
Wisconsin Central Ry. Co. v. Wisconsin P. Land Co., 71 Wis. 99.

In the case of Saward v. Denney, Vol. 158 U. S. 180-183, Chief Justice Fuller stated this jurisdictional question as follows:

"1. The certificate of the presiding judge of the state court as to the *existence* of grounds, upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

"Powell v. Brunswick County Board of Supervisors, 150 U. S. 433, 439.

"2. That the title, right, privilege or immunity must be *specifically set up, or claimed* at the proper time and in the proper way.

"Miller v. Texas, 153 U. S. 535.
"Morrison v. Watson, 154 U. S. 111.

"3. That such claim cannot be recognized as properly made, when made for the first time in a petition for rehearing after judgment.

"Loever v. Schroeder, 149 U. S. 580, 585.

"4. That the petition for the writ of error forms no part of the record upon which the action is taken here.

"Butler v. Gage. 138 U. S. 52.

"5. Nor do the arguments of counsel, *though the opinion of the state courts are now made such by rule.*

"Gibson v. Schouteau, 75 U. S. 314.
"Parmalee v. Lawrence, 78 U. S. 36.
"Ross v. U. S. M. Co., 108 U. S. 447, 484.
"U. S. v. Taylor, 147 U. S. 695, 700.

"6. The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

"Hoyt v. Thompson, 66 U. S. 518.
"Maxwell v. Neubold, 59 U. S. 18, How. 515.

"7. *Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved, so that the state court could not have given judgment without deciding it. That is a definite issue, as the possession of the right must be distinctly deducible from the record,* before the state court can be held to have disposed of such federal question by its decision.

"Powell v. Brunswick County Board of Supervisors, 150 U. S. 433, 439."

We say, tested by these principles so clearly stated by the Chief Justice, that both by pleadings and by proofs, and by a clear determination of the supreme court of Michigan, upon the issue thus raised, a federal question was not only presented by the pleadings, and passed upon by the supreme court of Michigan, but that this federal question thus presented and determined was the basis of the entire opinion; that is, of all the *determining conclusions* of the supreme court of Michigan, which defeated the title of complainant in that court.

As supporting the above opinion of Chief Justice Fuller, see:

Baldwin v. Kansas, 129 U. S. 52, 56.
Kaukana W. P. Co. v. Green Bay & M. Canal Co., 142 U. S. 254.

Chicago & North Western Railway Co. v. Chicago, 164 U. S. 454, 457.
Chicago & R. Co. v. Chicago, 166 U. S. 226, 230, 242.
Oakley Stave Co. v. Butler County, 166 U. S. 648, 653, 654, 660.
Levy v. Superior, 167 U. S. 175, 177.

"A judgment which *rejects the claim, but avoids all "reference to it, is as much against the party's right, "within the meaning of Sec. 709, as if it had been spe- "cifically referred to, and the right directly refused.*"

Chapman v. Goodneau, 123 U. S. 511, 548.
O'Neil v. Vermont, 144 U. S. 323, 358.

"And if the decision of the supreme court of a state "is against the plaintiff in error, *and must necessarily "have involved a federal question, duly claimed in the "state court, the jurisdiction of this court exists to re- "view the case.*"

III.

Complainant Acquired Title to Center of the Lake.

It is established beyond controversy by the United States courts, that the abutting owner on an inland lake or river not navigable, acquires title *to its center;* though he pays only for the upland, according to the survey of the surveyor general.

In the case of St. Paul & Pacific Railway Co. et al v. Schurmeier, 7 Wall. 272, it was held as follows: "Meander lines are run in surveying *fractional* por- "tions of the public lands, bordering upon navigable "rivers, not as boundaries of the tract, but for the pur-

"pose of defining the sinuosities of the banks of the "stream, and as the means of ascertaining the quantity "of the land in the fraction subject to sale, and which "is *to be paid for* by the purchaser * * * Propri- "etors bordering on streams not navigable, *unless re- "stricted by the terms of their grant, hold to the center of "the stream;* but the better opinion is, that the propri- "etors of lands bordering on *navigable* rivers under "titles derived from the United States, hold only to "the stream, as the express provision is that all such "rivers shall be deemed to be and remain public high- "ways. Grants of land bounded on rivers above tide "water, says Chancellor Kent, carry the exclusive "right and title of the grantee *to the center* of the "stream, unless the terms of the grant clearly denote "the intention to stop at the edge or margin of the "river; and the public in cases where the river is nav- "igable for boats and rafts, have an easement thereon, "or a right of passage, subject to the jus publicum as "a public highway. 3 Kent's Com., 11 Edition 427. "The views of the comentator are, that it would require "an *express exception* in the grant, or some clear or un- "equivocable declaration, or certain and immemorial "usage, *to limit* the title of the riparian owner to the "edge of the river, because as the comentator insists, "the stream when used in a grant as a boundary, is "used as an entirety to the center of it, and he conse- "quently holds, that the fee passes to that extent. "Decided cases of the highest authority affirm that "doctrine; and it must doubtless be deemed correct in "most all jurisdictions, where the rules of the common "law prevail; as understood in the parent country. "Except in one or two states, those rules have been "adopted in this country, as applied to rivers not nav- "igable, when named in a grant or deed, as a boundary

"to land. Subsequently the same rules were adopted "by congress, as applied to streams not navigable; but "many acts of congress have provided, that all navig- "able rivers or streams in the territory of the United "States offered for sale, should be deemed to be and "remain public highways.

1st Statute at Large, 491.
2nd Statute at Large, 235, 279, 642, 666, 703, 747.
3d Statute at Large, 349.

" * * * Extended discussion of this topic, how- "ever, is unnecessary, as the court decides to place the "decision in this case, upon the several acts of congress, "making provision for the survey and sale of the pub- "lic lands, bordering on public navigable rivers; and "the legal construction of the patents issued under "such official surveys, and sale of such lands, must "have the same effect, as it would be entitled to receive "if it were incorporated into the patent, especially as "there is nothing in the field notes, nor in the official "plat or patent inconsistent with that explicit reserva- "tion * * * Viewed in the light of these construc- "tions, the court does not hesitate to decide, that "congress, in making a *distiction between streams navig- "able, and those not navigable*, it intended to provide "*that the common law rules of riparian ownership* "should apply to lands bordering *on the latter;* but "that the title to lands bordering on *navigable* streams, "should stop at the stream, and that all such streams "should be deemed to be and remain public highways."

In the case of Hardin v. Jordin, 140 U. S. 402, the court held as follows: "It has been the practice of the "government, from its origin, in disposing of the pub- "lic lands, to measure the price to be paid for them, by "the *quantity of upland granted; no charge being made* "*for the lands under the bed of a stream or other body of*

"*water.* The meander lines running along, or near "the margin of such waters are run for the purpose of "ascertaining the exact quantity of the upland to be "charged for, *and not for the purpose of limiting the "title of the grantee to such meander lines.*"

In Barney v. Keokuk, 94 U.S. 324, and Packard v. Bird, 107 U.S. 661, and Hardin v. Jordan, 140 U.S. 402, it was held: that the beds of streams, above the flow of the tide, whether actually navigable or not, *belonged to the proprietors of the adjoining lands.*

St. Louis v. Ritz, 138 U.S. 226.

In the case of Hardin v. Jordin, 140 U. S. 402, the court uses the following language: "The disposal of "the present case, therefore, seems to us to require no "further discussion—only an answer to the single "question, what is the common law, in regard to the "title to fresh water lakes and ponds? And on this "subject we think there can be very little difference "of opinion. Of course, as already stated, there is no "question, where the land fronts upon a fresh water "stream or river. In such cases, the law is perfectly "plain. Sir Mathew Hale states: Fresh rivers of "what kind soever, do of common right *belong to the "owners of the soil adjacent;* so that the owners of the "one side, have of common right the property of the "soil, and consequently of the right of fishing usque "ad filium aquae, and the owners on the other side, "the right of the soil and fishing under the filium "aquae on their side."

So it is clear, that the complainant acquired title *to the center* of this inland lake. Certainly this is so, unless the patent to Burnell, through which the Cleveland Iron Mining Company claims title by its description, *east half of 10 and west half of 11*," carried title to the south line of 10, projected through the lake.

No executive of the government, charged with the duty of selling the public lands, and issuing the patents, could *vary* the uniform rule as to title to purchasers by any form of patent of abutting lands on inland lakes, ponds or rivers. as the United States courts have frequently held, that "the registers of local land "offices, are mere sales agents of the government. The "survey and division of the lands are entrusted to "the surveyors. Their action is conclusive, and the "registers are bound to sell by the plats furnished "them. They can sell in no other manner."

Kissell v. St. Louis Public Schools, 18 How. 19.
Bagnell v. Broderick, 13 Peters 450.
Barnard v. Ashley, 18 How. 43.
West v. Cochran, 17 How. 403.
Gazzam v. Lessee of Philips, 20 How. 372.

In Gazzam v. Lessee of Philips, 20 How. 372, the court held, that the surveyor general had power to make fractional subdivisions, of fractional sections of public land, containing more than eighty acres. In fact that he had discretion as to the form of division of public lands, and the description of those divisions; the court in that case overruling Brown v. Clements, 3 Howard 650. In fact it is the settled law of the United States courts, that the descriptions as made of the surveys, by the surveyor general are controlling; and when the patent is of the lands of a governmental description, according to government survey, and is of a fractional portion of land fronting upon an inland lake or water, according to government survey, these are the controlling words, and limit the amount of land to be paid for to the acreage of the fractional description as determined and entered by the surveyors in their minutes and upon their maps. So the patent to Burnell, which describes the land conveyed as the east half of 10 and the west half of 11, according to

government survey conveyed only the acreage as specifically stated by the surveyor general, as the acreage of each fractional lot within the limits of what would be the east half of section 10 and the west half of section 11, namely 555.15 acres, the specific acreage stated in the patent, and appearing by the government plats offered in evidence to be the acreage of the uplands, and according to government survey; and all title which Burnell obtained under his patent to a portion of the inland lake (which which would be to the center of the lake) was by virtue of the law of riparian ownership, to which we have referred above; and not by virtue of the wording of the patent itself; and no title was acquired by Burnell, or conveyed by him to the Cleveland Iron Mining Company beyond the center of that lake.

Section 464 of the United States Statutes at large provides that the field books of the surveyor general shall be returned by the surveyor general, who shall thereafter cause a description of the whole lands surveyed to be made out and transmitted to officers who may have to superintend the sales, which is to be recorded and be in the possession of the parties who make the sales, and presumptively for use in such sales.

In the case of Parker v. Kane, 22 How. page 11, the court held, "that a description as a lot necessarily re-"fers to the official surveys in the general land office, "to which the court looks for the final determination "of the matter;" and which the statutes of the United States provides shall be the means of finally determining both the descriptions and quantity of lands conveyed.

In the case of Willson v. Hoffman, 70 Mich. 527, the court held as follows: "In granting patents for lands,

"it is usual for the government to add immediately "after the statement of the number of acres which the "tract contains, if it be fractional, these words: 'ac- "cording to the official plat of the survey of said lands "returned to the general land office, by the surveyor "general'. Such language when used constitutes a "part of the description of the premises conveyed, and "limits the purchaser to the tract as marked upon the "plat of the surveyor general. This was so held in "Gazzam v. Lessee of Philips, 20 Howard 372, which "overruled Brown's Lessees v. Clements, 3 Howard "650. This was the language used in the patent to "Tingley."

Thus, the description in the patent to Burnell, that it was 555.15 acres, according to government survey, fixed as a limitation the description and amount of the lands conveyed, namely, the fractional lots abutting upon the inland lake in question, and any right acquired under said patent in the land under the lake was by virtue of riparian ownership, which was only to the center of the lake.

IV.

Was the Decision in the Lower Court Based upon Ground Independent of the Federal Question?

Counsel for the defendant The Cleveland Iron Mining Company, in their printed brief served upon us, make a statement of facts *without preparing a printed record* of the evidence, or any portion of it, to submit to this court, sustaining their assertions; and without

even references to the printed record in the court below. This we claim is ground for the dismissal of this motion, and that it should be dismissed; as a motion for the dismissal of the writ of error in a case involving the wide and important interests which this case involves, should not be considered upon mere statements of counsel, not supported by a proper record for examination by the court. And we ask that the motion be dismissed for that reason. It is not our purpose to go into the review of the extensive facts of the case, or any fact, without reference to a record. As we understand the only questions involved here, are:

First. Was there in the court below a federal issue and passed upon by the lower court?

Second. Was the decision of the lower court arrived at upon ground independent of the federal question?

We think we have pointed out fully that a federal question is at issue in the case. We will now consider whether the supreme court of Michigan decided the case adverse to complainant independent of conclusions arrived at in disposing of the federal question. We assert that all of its conclusions were based upon, and collateral to the federal question, and cannot be separated from it; the lower court having held, as we have pointed out, that "complainant owned no specific piece of land north of the section line (south line of sec. 10), even under its own theory which could be measured by metes and bounds". See 76 N.W. Rep. 403. It proceeded, having laid the foundation therefor, by saying that the "complainant *owned no specific piece of land north of the section line*", to hold, that the Michigan statutory prohibition against alienating mining property, without the vote of *three-fifths* of the stock did *not apply* to this case because the complainant had no title in fee; and to hold that a pumping contract dated

the 17th day of March, 1892, signed by the mining agents of the three mining corporations, without the consent or knowledge of the stockholders of the complainant company, *amounted to a conveyance* by complainant to the defendants of *thirty acres of very valuable mining land;* the title to which in fee, was clearly in the complainant, as pointed out by the decisions above referred to. The officers of the complainant who signed this contract were simply the agents having charge of the mining business of this company, with no powers granted them by the stockholders to convey title, simply the right to operate the mine and to do what was a part of its operation—the pumping of the water that should gather in its mine, and upon the surface, as well as other necessary duties in connection with the operation of the mine, and not the disposing of the fee itself.

The Michigan statutory provision prohibiting alienation without the authority of three-fifths of the capital stock of the company, is section 4052 of Howell's Annotated Statutes of Michigan, and is as follows:

"No alienation, division, sale or mortgage of any, or "any part of the mine, works, real estate or franchise "of any corporation mentioned in the first section of "this act, shall have any force or effect, or pass any "title thereto, or interest therein, unless expressly "authorized by the vote of *three-fifths in interest of the "entire stock of said company*, actually present or le-"gally represented at some meeting of stockholders "called and notified, in accordance with the provisions "of the preceding section of this act, except the sur-"face right to land for village lots, or land not re-"quired for mining purposes, from which the timber "has been removed. Provided rights of way and de-

"pot grounds for railroads, and rights of way for rail-
"ways, may be conveyed by the proper officers of such
"co porations, when authorized by a vote of the major-
"ity of the directors thereof at any meeting regularly
"held."

The next section of the statute, 4053, provides for the mode of proving such action by the stockholders, and for preserving evidence of such action, that it may appear as a part of the chain of title. The statute is as follows:

"Any person desiring to *perpetuate* evidence of the
"facts on which the legality of any alienation, divi-
"sion, sale or mortgage of any of the real estate, mine,
"works or franchises of any such corporation, depends,
"may procure,

"*First.* An affidavit of the person or persons who
"served the notices of the meeting at which the same
"was authorized, on the several stockholders, showing
"the time and manner of such service.

"*Second.* An affidavit of publication of the notice
"of such meeting, if such notice be published, to be
"made by the printer of the newspaper in which the
"same was published, or by some one in his employ
"having knowledge of the facts; and

"*Third.* A transcript of the record of proceedings
"of such meeting to be verified by the oath of the sec-
"retary or other officer of such corporation having cus
"tody of said record.

"*Fourth.* Said affidavit and verified transcript may
"be recorded in the office of the register of deeds of
"the proper county in the book of miscellaneous rec-
"ords, and when so recorded, the original affidavits
"and transcripts, the records thereof, or a certified
"copy thereof, shall be prima facie evidence of the
"facts therein contained."

This statute not only provides that there *shall be no alienation, division, sale or mortgage*, of any *or any part* of the mine works, real estate or franchise of any corporation mentioned in the first section of this act * * unless expressly authorized by the vote of three-fifths in interest of said company actually present or legally represented at some meeting of stockholders called and notified, as provided by the statute quoted above; but it also provides how proof shall be perpetuated, and how made; that three-fifths in interest of the entire stock of the company authorized the conveyance of its property and franchise; and the statute provides for the recording of such action by the stockholders upon the records of the county with as much formality as the recording of deeds of conveyance. There is no proof whatever of any such action; but it appears affirmatively that there were negotiations between Alfred Kidder, mining agent of the complainant, and Mr. Mills, mining agent of The Cleveland Iron Mining Company, and by him with the defendant The Lake Superior Iron Company, with regard to making the pumping contract. See page ~~149~~ of said record; the pumping contract appearing upon pages ~~150~~ and ~~157~~ of said record.

The defendants claim this pumping contract to be in effect a *conveyance* by the complainant of its title, to its portion of the bed of the lake north of the south line of section 10; and the supreme court of Michigan has sustained this contention of the defendants—*not* as it holds, by ignoring the statute to which we have referred; but by *first holding* as we have pointed out above; that the complainant *had acquired no title in fee to the land in dispute.* Holding, that "The com-"plainant *owned no specific piece of land north of the* "*section line*, even under its own theory which could

"be measured by metes and bounds. How much, if "any it owned, could only be determined by agree- "ment, or a decree of a court of equity." Now, we respectfully submit, that it is impossible to know what the supreme court of Michigan meant by this holding. We can only surmise that the learned judge who wrote the opinion had in mind that the right acquired by complainant to the territory under the waters of the lake appurtenant to its short frontage, was an *inchoate, indefinite right; which did not amount to a title in fee.* That it was a right that could not be measured, because it would have to be determined what it was, either by agreement or by the decree of a court of equity. The court certainly could not have meant that a title in fee of land consisting of about *thirty acres*, could not be determined by metes and bounds; either on general rules of law established, or by equitable rules, where disputes existed between the parties as to this particular case; even though it was necessary to go to a court of equity to determine the dispute between the parties as to the apportionment of their rights. It did not make the title, which they were seeking to have equitably located, any less real estate or any less determinable by law governing real estate, on account of such dispute. So we say if in the determining of the federal question, the Michigan supreme court intend to say that the complainant had no real estate, no vested title in realty in the disputed territory under the waters of the lake, and therefore its mining agent and superintendent could, under the name of pumping contract, convey away any rights which it had, under the theory of settling boundary lines, or any other theory; then not only was the court in error as to the federal question, but was basing its conclusion as to the validity of the contract made by

the three mining agents of the companies, upon the erroneous determination of the federal question; and such determination was therefore collateral to and dependent upon the erroneous determination of the federal question referred to.

Counsel for the defendants, to sustain their contention, quote from the opinion of Chief Justice Fuller in the case of Hammond v. Johnson, 146 U. S. 78, for the purpose of pointing out the rule of this court as to cases determined by lower courts upon grounds independent of the federal question involved. The clause in that opinion quoted by counsel we are entirely in accord with, and it is our contention, and is as follows:

"It is well settled, that where the supreme court of "a state decides a federal question in rendering a "judgment, and also decides against the plaintiff in "error upon an independent ground *not involving a "federal question*, and broad enough to maintain the "judgment, the writ of error will be dismissed without "considering the federal question."

It will thus be seen that the ruling is, that if the holding claimed to be an independent one, *involves the prior determination of the federal question, and it rests upon the prior determination of that question, and is ancillary to, and subservient to the determination of the federal question*, and is not broad enough, and distinct enough to stand alone, without such determination in the determination of all of the rights of the parties in a clear, comprehensive and just way; then it is not such an independent ground as will deprive this court of jurisdiction. Such is the case at bar. Our contention is,

First. That this pumping contract was not a conveyance of the real estate rights of complainant in any way. That there was no such intention on the part of

even the mining agents and mining superintendents who had to do with the making of the contract.

Second. That even if they had so intended, that the contract is absolutely void as a conveyance, as it was without the sanction and authorization by three-fifths in interest of the entire stock of the corporation, and that nothing can give vitality to such a contract, to convey the realty of the mining corporation; and the only basis upon which the court below holds the contract valid is to hold "complainant *was not alien-* "*ating, dividing or selling any of its real estate within* "*the language of the statute. Alienating means in law* "*a transfer of title by conveyance.*" 76 N. W. Rep. 403. It is difficult to understand what the learned judge delivering the opinion meant by that statement; when it is claimed that the territory lying between the center of the lake, and the south line of section 10, opposite lots 2, 3, 4 and 5 of section 15, amounting as shown by the figures in the proof, to about *thirty acres*, is claimed to be effectually disposed of, whatever those rights may be, by the pumping contract. What can that pumping contract be but a conveyance of the title of the thirty acres, by whatever name it may be called, if it conveys title to said land? But, says the learned judge in the opinion, on the same page from which we have quoted, "It may be said that the stat- "ute does not apply to the voluntary adjustment of "these lines, but to alienation by deed of conveyance." It is a misnomer to say that under the circumstances this was simply the *adjustment* of *lines.* It was the determination of who owned *thirty acres* of territory *surrounded by independent lines*, which the bill asked the court to definitely and equitably locate. The learned judge speaks of this matter as though it were merely the adjustment of border lines, as a line be-

tween two lots of a city, as to just where that line should be between adjoining owners. That is not the case. The fundamental inquiry is, whether or not the complainant or defendants owned the territory abutting lots 2, 3, 4 and 5 of section 15, under the waters of Lake Angeline, and to its center, amounting to thirty acres; or, whether the defendant owned it. The determining where the lines should be located, to equitably surround the thirty acres, if owned by the complainant, would be simply an incidental determination of the court, or the determination of the *method* to be adopted by the parties in locating those lines. It will be noticed that the statute against alienation, also prohibits "dividing", etc., real estate, etc.

It will be noticed that the learned judge in the court below, both in stating the claims of complainant and of defendants, sets forth the conflicting claims of ownership of the land in question under the lake (see 76 N.W. Rep. p. 400), and then points out the claim of defendants of title to the disputed territory because of the making of the pumping contract, which was a division of the territory under the lake; this pumping contract carrying out that *division*, which we say is simply an attempt to alienate or convey a title without right, if there had been any intention of the agent of the complainant company to do such a thing, which they deny. After stating the facts the first determination made by Justice Grant in the lower court was as follows: "No fixed rule ever has been, "or ever can be laid down for the division of the terri- "tory covered by these inland lakes with irregular "shores. Each case must depend upon its own pecul "iar circumstances and facts, and as reasonable a "division arrived at as possible"

See 76 N. W. Rep. page 401.

This is undoubtedly correct, and was the occasion of our filing the bill; and the learned judge does not speak of it there as simply settling a boundary, but as a "*division*" of the territory covered by the inland lakes, which it was; a conveyance or an attempted conveyance, if the agent of the complainant had either intended to do so, or had had any authority to do so.

The next holding of Justice Grant, on the same page of the opinion, is as follows: "The *first* obstacle for "the complainant to remove, before resorting to an "equitable apportionment is this contract (pumping con- "tract), recognized as valid and acted upon for nearly "five years by all parties." It was recognized as a contract for pumping, draining the mine, etc.

The next holding of Justice Grant in the case is on the next page of the opinion, and is as follows: "We "find that the parties in reliance upon that case, en- "tered into a *deliberate contract* (pumping contract) es- "tablishing their boundary lines, and determining the "amount of territory belonging to each, complainant "made the contract with the knowledge that it gained "territory south of the line, known to be valuable, "while it surrendered territory north of the line, not "then known to possess any value."

Thus, the court asserts and holds the validity of the contract without giving any reason at that point for it: Subsequently holding, as we have pointed out, because the statute of Michigan against alienation *did not apply.*

Again, on the same page of the opinion, Justice Grant holds as follows, as to the pumping contract: "The *agreements* and settlements of parties made with "full knowledge of the facts, and in reliance upon the "law, ought to be as binding as the judgment of a court "in a particular case.* * * * * *Judgments rendered,

"and contracts made, upon the faith of the law, as "enunciated in the decision of the court, in the "absence of fraud or misrepresentation, must stand."

And again, "This case, therefore is to be decided "according to existing state of things, when the *settle-"ment in question took place*" (referring to pumping contract), and on the next page of the opinion, the learned judge again says: "The sole basis of complainant's "claim is, that the decision of this court, upon the faith "of which the *contract* was made, was subsequently "overruled."

Again holding, on the same page, "Does the *contract* "*settle the boundary line* and acquiescence therein, and "the *acts done thereunder estop* complainant, to now "assert a different line? The rule is settled by the de-"cisions of this court, that where disputed boundary "lines have been established *by express agreement*, or "under such circumstances, that an agreement will be "implied, and parties have for any considerable time "recognized them, they will be upheld, though title by "adverse possession could not be maintained."

And again, on the same page of the opinion the court held, "If his testimony be true (referring to Kidder, "the mining agent), and for this purpose the company "must stand by its own testimony, there was a dispute, "and it was settled *by the agreement*."

Again, the court held, "Complainant, however, in-"vokes the doctrine that title to land cannot rest on "estoppel, on account of the statute of frauds, and that "a vote of three-fifths of the entire stock of the com-"pany is essential under the statute to convey title. "The obvious reply to the first proposition is that it is "also established that the statute of frauds, *does not* "*apply to boundary* lines, and that the doctrine of estop-

"pel will be applied to the voluntary adjustment of dis-
"puted boundaries."

Again holding, "Under the theory of complainant,
"corporations could not settle boundary lines without
"a meeting of the stockholders called to pass upon the
"alienation of its lands, etc."

And then in the opinion we come to the quotation referred to above, in discussing the federal question. "The Cleveland Iron Mining Company claimed title "by virtue of the original patent. The complainant "*owned no specific piece of land north of the section line*, "*even* under its own theory, which could be measured "by metes and bounds, how much, if any, it owned "could only be determined by agreement, or the decree "of a court of equity."

Further, "There was no alienation of land, as re-
"quired the vote of the stockholders."

Further, "All are now estopped to deny its due ex-
ecution and validity." Referring to the above refer-
ence to the "pumping contract."

Further, on the next page, "The *foundation of the* "*contract* was the settlement of the boundary lines, "and the *division of the territory* and apportionment "of expenses in accordance therewith."

The above quotations cover the substance of the entire opinion, the determination of the court. Incidental *dicta* is used in the discussion of the case, but the holding and determination is *based* upon two grounds:

First. That the complainant *had no title in fee.*

Second. That having *no title in fee*, the contract of the 17th of March, 1892, known as the pumping contract, *divided, apportioned* and *conveyed* every right which it did have (the court not determining what that was), and that the statute against alienation of

corporate real estate *had no application;* which holding *could not have been made except upon the theory that the determination of the federal question above referred to was correct.* Incidentally the court held, that the complainant was estopped by its *contract* (the pumping contract) from asserting any title under the lake. Thus, basing the suggestion of estoppel upon the contract itself, as a valid one.

We submit that the entire determination on all the material questions in this case were subservient to and based upon the erroneous determination of the federal question, and that jurisdiction should not be ousted; but that the entire record should be reviewed by this court.

It will be noticed that Justice Grant does not for a moment intimate in his opinion that the real estate of a mining corporation can be disposed of by conveyance, without a three-fifths vote of the stock in interest. In fact, by inference affirms former holdings of that court that it cannot, only says the statute does not apply.

Justice Thomas M. Cooley, of Michigan, delivering the opinion of that court, referring to this act, for the purpose of protecting stockholders against any acts or omissions of the corporate agent, says, "This act was "passed to protect the interest of stockholders in min-"ing companies. It intends that their mining prop-"erty *shall not be conveyed away or mortgaged, except "by their deliberate action after they have been notified "of a proposal to do so, and have had time to deliberate "upon and fully consider it.*"

Beecher v. M. & Rolling Mill Co., 45 Mich. 103, 107.
Lockwood v. Thunder Bay Co., 42 Mich. 539.
Hartford v. Cambria, 80 Mich. 495.

And Judge Campbell, one of Michigan's former supreme judges, referring to this statute requiring the recording of the action of the stockholders, referred to above, held that: "Provision was made for obtaining "and recording evidence of such action. * * * * "*The deed is not made presumptive evidence of the right-* "*ful character of the sale.*"

M. H. & O. R'y Co. v. Atkinson, 44 Mich. 167, 168.

It must affirmatively appear that the statute has been complied with. There can be no estoppel where there is no legal power to do the act, in reference to which it is claimed the estoppel exists, i. e. *parting with this land.* The officers, directors and agents could not by direct conveyance transfer title. Neither can they by acts or omissions."

O. & M. Co. v. O. Co., 130 U. S. 1, 37.
Pa. R. R. Co. v. St. L. R. 118 U. S. 290, 317.

The supreme court of Michigan, in its opinion in this case could not have intended to hold, as an independent determination, that a title by estoppel was created, independent of the pumping contract referred to, because it has many times been held in Michigan, by that court, that "*title to land cannot pass by a mere* "*estoppel, shown by parol;* neither can an apparent "title be assailed by the parol evidence of one who "has caused its transfer."

First National Bank of Kalamazoo v. McAllister, 46 Mich. 398-406.

And Justice Cooley, in Hayes v. Livingstone, 34 Mich. 384, held: "Title to lands *cannot pass by estop-* "*pel;* and if the plaintiff claims not the title, but the "right of permanent possession, this comes to the same "result. Citing Nims v. Sherman, 34 Mich. 45." And in the case of Insurance Co. v. Dix, decided Sept. 14th,

1897, by the Michigan supreme court, and 72 N. W. Rep. 179-180, it was held by Justice Hooker, that "It "was well settled in Michigan, that *titles in land can-* "*not rest on estoppel in pais.*"

So, it is clear that when Justice Grant uses the language: "The complainant was estopped by its own contract from asserting any title under the lake", he referred only to an estoppel *built upon the contract*, and upon the theory that the contract was a *valid and legal one*, and whether valid and legal, as we have pointed out, *rests upon the federal question.* So that there is no determination in this case by the supreme court of Michigan, that *does not rest* upon the erroneous determination of the federal question.

V.

A Few Facts.

Though it is not our purpose, in considering this motion, to go into the review of the facts, except so far as it is necessary in discussing the question of jurisdiction, that is to any extent—, still, on account of the discussion in defendant's brief, in support of their motion, we will call attention to a few prominent facts bearing upon the question of title.

As we have already pointed out, since 1852 and 1853, complainant, or its grantors, have been the owners of lots 2, 3, 4 and 5 of section 15, lying south of the lake, and therefore owners of the riparian rights under the lake to its center. It appears that, since the early sixties, the complainant has been operating an iron

mine on these forties, and has all of the time openly asserted ownership north of the south line of section ten, and has been in actual occupation of that territory; filling in with waste from its mine, north of the south line of section ten, and has made three or four acres of ground above the water level in the lake, and has erected buildings thereon, such as machine shop, blacksmith shops, etc , worth several thousand dollars. (See pages ~~144, 145, 146~~ of said Record). This is admitted in part on page two of defendant's brief. Mr. Kidder, the local mining agent of the corporation; the company having its headquarters and chief business managements in Pittsburgh and Cleveland, refused to consider a proposition made by Mr. Morse, the local mining agent of the Cleveland Iron Mining Company, for complainant to quit claim its interest north of the south line of section ten to the Cleveland Iron Mining Company, provided the Cleveland Iron Mining Company would quit claim all of its territory south of that line. This is admitted in defendant's brief, page 3. Thus, the ownership of the complainant north of the south line of ten, was asserted by it and was, to a certain extent, recognized by the Cleveland Iron Mining Company, or by Mr. Morse its local agent, by negotiating the purchase, or rather exchange of territory, as admitted.

It further appears that Mr. Kidder, the local agent, openly and in every other way, by occupation, asserted this ownership and right of this territory, until he learned of the decision of the Michigan supreme court, in Clute v. Fisher, 65 Mich. page 48, where the court, contrary to its former decisions, held, that the owner of a fractional lot on an inland lake, "had the right to *square out that lot*, by extending the line into the lake, so as to take in the territory submerged by the lake

within said extended lines", which would deprive the complainant of its title to the center of the lake, if enforced by the squaring out of the fractional forties on the north side of the lake, as shown by the little map of the lake attached; and though he believed that decision to be wrong and unjust, and that it would be subsequently overruled; under the advise of his counsel, as a precautionary measure, moved his buildings, consisting of machine shop, etc., off of the ground which he had filled in the lake, north of the south line of section ten, just over the line to the south, and made no resistance to the rights asserted by the defendants to the territory north of the south line of section ten, until the Michigan supreme court *overruled* Clute v. Fisher, 65 Mich. 48, in Ice & Coal Company v. Ice & Coal Company, 102 Mich. 227, there holding, as held by this court in Gazaam v. Lessees of Phillips, 20 How. 372, that the abutting owner on an inland lake, *is the owner to the center of that lake*, and also holding, that the decision of Clute v. Fisher, 65 Mich. 48, was erroneous.

Mr. Kidder testified that he first learned of this overruling of Clute v. Fisher in February, 1896 (see pp. 147, 148 of said Record), though the decision of Ice & Coal Company v. Ice & Coal Company was made September 27th, 1894. (See p. 172 of said Record). That he immediately notified the company of the overruling of Clute v. Fisher, and that the company directed him later, to maintain their rights there. He further stated, that, in the meantime, the complainant, in exploring for iron ore south of the south line of section ten and near the line, discovered iron ore, and drove their drift on the bottom of their mining shaft, to the south line of section ten (see pp. 165-167 of Record); that this was before the overruling

of Clute v. Fisher. That he informed Mr. Mills, who was the mining captain for the Cleveland Iron Mining Company, of the discovery of this ore; *that this discovery was made by them, in May or June, 1891* (see p. ~~197~~ of said Record). That he got information by his work, that the ore would probably go under the lake north of the south line of ten. in 1892 (see p. ~~167~~ of said Record). That, in the spring of 1895, the Cleveland Iron Mining Company began mining under the lake in this disputed territory. That after he was directed by his company to do so, on October 29th, 1896, he served notice on the defendant the Cleveland Iron Mining Company, that they were upon the territory of the complainant (see p. ~~168~~ of said record). The defendant, The Cleveland Iron Mining Company, kept right on mining in this disputed territory to the time of hearing in the circuit court for the county of Marquette, in 1897, and ever since; and by the evidence which was uncontradicted upon the hearing, it appears that the total expenditures of the defendant, The Cleveland Iron Mining Company, in the driving of its drifts, and its total equipment in the disputed territory of machinery, etc., a large portion of which was portable and and easily moved, amounted to the cost of between fifty and fifty-one thousand dollars, and that the *profit* which it had realized from the mining of the iron ore, on this disputed territory, amounted to over $156,000, leaving the balance over $100,000, of profit, over and above every expense of every name and nature that it had incurred, thus show that there was no equity, in defendant claiming that it had made large expenses and would suffer loss by this arroneous holding of Clute v. Fisher, and its overruling in Ice and Coal Co. v. Ice and Coal Co., and the asserting title by complainant of its property, which it

had never conveyed, and had, in no way, intentionally disposed of, and had not disposed of, unless the contract, known as the "pumping contract" had that effect? As we have said, the pumping contract was made upon the 7th of March, 1892 (see page 150 of said Record).

This pumping contract was made after the decision of Clute v. Fisher, and before it was overruled by Ice and Coal Co. v. Ice and Coal Co., 102 Mich., and there was, in the minds of neither party to that pumping contract, any idea or intention, that the pumping contract should be a conveyance of real estate. There was no occasion for such an idea in the minds of either party, for, as we have said, the Michigan supreme court had erroneously interpreted the rights of the parties, at that time, in Clute v. Fisher, contrary to prior holdings, and it was supposed by Mr. Kidder that his company had been deprived of its legal rights by such decision, and the defendants supposed that they had the title affirmed to them, by that decision, which they had previously tried to negotiate to purchase, through Mr. Kidder, but could not; and there was neither an intention to purchase, nor an intention to sell, any real estate rights, at the time of making that paper, as appears by all the testimony, the contract was made simply to arrange for pumping the water out of the lake. In considering the question of jurisdiction, these facts probably have no bearing, except to point out that the claim of equities asserted in counsel's brief for defendant are without substantial foundation, and that it is a cold, naked question of fact whether or not the complainant obtained title to the territory in question, from the government, through its grantees; or whether the defendant acquired such title, and whether the complainant, if it acquired such

title, has ever legally disposed of it to the defendants or either of them. These were the questions presented to the state court. As we have pointed out above, the the state court held, *that the complainant acquired no title, in fee,* to the territory in question. That the defendants did, holding the federal question in favor of defendants, and further holding, that the pumping contract *was a practical conveyance of title,* and of right that the complainant had; and that *because* the complainant *had no title in fee,* no real estate right, possessed *only some inchoate right, just what the court does not say.* The Michigan statutes *forbidding alienation* of real estate of mining corporations, *without the vote of three-fifths* in interest of all the stock, this does not apply, because no real estates interest attached to complainant. These are the questions, except possibly, the further question, whether the court held the doctrine of estoppel, on account of the pumping contract; that is estoppel by contract. If it did, this question would be but ancillary and *supplemental to the federal question,* as would the question of the contract itself, and could not, in any sense, be an independent determination that would warrant or support the decree against complainant, independent of the federal question involved, as it is as dependent on the federal question as is the question of title by contract; which we have fully discussed above.

We submit, that the jurisdiction of this court is fully sustained and the defendants have pointed out no valid reason why the jurisdiction should not be exercised, and the case reviewed upon its merits, by this court.

VI.

The Court Should Inspect the Record to be able to Determine the Federal Question.

This was so held in a recent case, Green Bay & M. Canal Company v. Patent Paper Company, 19 Supreme Court Reporter, 100, in the language of Justice Shiras, on a motion to dismiss the writ, in the following language: "The contention, that no federal question "is disclosed in the record is sufficiently disposed of, "we think, by an inspection of the cross complaint "filed by the Green Bay & Mississippi Canal Company. "It was there *claimed* that the water power in question, "was created by a dam, canal and other improvements "owned and operated by the United States, and that "the right *and title* of the said Canal Company, to the "use of the water power so created, arose under and by "virtue of certain *alleged* and recited acts of congress, "and acts of the legislature of the state of Wisconsin, "relating to the improvement of Fox River as a public "highway, and especially *by virtue of an alleged con-"tract between the United States and the Canal Company*, "whereby the use of the surplus water created by said "dam and canal was granted and reserved to the Canal "Company. Assuming the truth of such allegations, "it is *plain* that the plaintiff in error *asserted a right*, "*title and authority*, exercised under the United "States. * * * * This contention is based on the words "in Section 709 of the Revised Statutes, carried for-"ward from the twenty-fifth section of the Judiciary "act of 1789, 'specially *set up or claimed*', and the "effect to be given to these words has been frequently "considered by this court. * * * * * The last elabor-

"ate discussion of this phase of the subject, is found in "the opinion of the court in Oxley Stave Co. v. But- "ler Co., 166 U. S. 648, 17 Supreme Court Rep. 709, de- "livered by Mr. Justice Harlan, in which many of the "cases are reviewed, and from which the preceding "quotation is taken; but *no particular form of words or "phrases has ever been declared necessary in which the "claim of Federal rights must be asserted.* It is suf- "ficient if it appears from the record, that such rights "were specifically *set up or claimed*, in the state court "in such manner, as to bring it to the attention of that "court. The true and rational rule this court said in "Bridge Proprietors v. Hoboken Co., 1 Wall. 143, is, "that the court must be able to see clearly, from the "whole record, that a certain provision of the constitu- "tion, or act of congress was relied on, by the party "who brings the writ of error, and that the *right thus "claimed by him was denied.*

"In Roby v. Colehour, 146 U. S. 159, 13 Supreme "Court Rep, 50, it was said, that our jurisdiction being "invoked, upon the ground that a right or immunity "specially *set up or claimed*, under the constitution or "authority of the United States has been denied by "the judgment sought to be reviewed, it must appear "from the *record* of the case, either that the right *so "set up or claimed*, was expressly *denied, or that such "was the necessary effect in law, of the judgment.* If it "appear from the record by the clear and necessary in- "tendment that the federal question *must have been di- "rectly involved*, so that the state court *could not* have "given judgment, *without deciding it that will be suf- "ficient.*

"Powell v. Supervisors, 150 U. S. 410.
"Saward v. Denny, 158 U. S. 180,
"Chicago & B. Q. R. Co. v. City of Chicago,
"166 U. S, 226.

"As then in its *cross complaint*, the Canal Company "explicitly *set up* and *claimed*, as the *foundation of these "alleged rights*, the acts of Congress, and the *transac- "tions, between the United Sates and the Canal Com- "pany*, under which the United States became the "owner of the dam, canal and other improvements on "the Fox River, and the Canal Company became vest- "ted with its rights in the surplus water power inciden- "tal to said works, and as in the final judgment, the "supreme court of Wisconsin *necessarily held adverse- "ly to these claims of federal right*, we hold that the "motion to dismiss, for want of jurisdiction, must be "overruled, and that *it is our duty to inspect the record, "in order to see whether there was error in the rulings of "the court below.*"

In the case of Dewev v. City of Des Moines, 19 Supreme Court Rep. 381, this court in the language of Justice Peckham, holds: "Nor does the record herein "show, by clear and necessary intendment, that the "federal question must have been directly involved, so "that the state court, could not have given judgment "*without deciding it. In such case, it has been held that "the federal question sufficiently appears.* Green Bay "& M. Canal Co. v. Patent Paper Co., 172 U. S. 28; 19 "Supreme Court Rep. 97", and cases cited.

"In substance, the validity of the statute, or the "right under the constitution, must have been drawn "in question. Powell v. Brunswick, 150 U. S. 433. Saward v. Denny, 158 U. S. 180.

"The latest decision to this effect is Capitol Nation- "al Bank v. First National Bank of Cadiz, 172 U. S. "425, Supreme Court Rep. 202."

As we have pointed out, the complainant relies upon its *title* by patent from the government, to the fee in question. The defendants rely upon their patents from

the government in conflict, with the title of complainant; and the state court has passed upon upon the title thus drawn in question by conflicting patents. The situation appears both by pleadings, and by proof, and by the decision of the state supreme court. This question of title from the United States is the fundamental element of the case, drawn in question by clear and necessary intendment. Therefore, as suggested by Justice Shiras in the opinion just cited, for a proper determination of the subject matter of so important a case as the one at bar; on a motion to dismiss, "it is "the *duty of the court to inspect the record*, in order to "see whether there was error in the rulings of the "court below", as well *as to determine whether a federal question is involved*, and whether that federal question is at the basis of all controlling determinations in the case.

VII.

Defendants' Claims.

On page 7 of defendants' brief, we find the following admission:

"It is true the defendant The Cleveland Iron Min-"ing Company *claimed* in one defense *of its answer*, "that the United States patent, under which it derived "title, gave it *all the land north of the south line of sec-"tion 10*, and that this fact *was denied* by The Lake "Angeline Company. The case, however, was not de-"cided, nor made to depend in any manner upon the "construction of such patents, but upon various other "defenses made in the answer."

Counsel on pages 7 and 8 state as follows:

"By examination of this opinion it will be seen that "no importance whatever was attached to the con- "struction of the patents under which the several par- "ties claimed title; but on the contrary, the bill in "chancery was dismissed, and the complainant denied "all relief on the following grounds, which, while not "stated in that order, were nevertheless distinctly de- "cided by the supreme court:

"*First.* That the exact boundary line between the "parties was in controversy, and that the parties set- "tled such controversy and fixed the boundary among "themselves, to-wit, the pumping contract; and the "proceedings which led up to it. In other words, "there was a boundary settlement."

As we have in the discussion above carefully pointed out, the determination of the court was that the defendants were the *owners* under their patent rights to about *thirty acres* of land in dispute between complainant and defendants, and that the complainant *owned no portion* of the territory north of the south line of section 10. This determination was in no sense the simple settlement of boundary, but was the determination of ownership of a large and very valuable mining territory. It was the determination that the pumping contract was valid, though not complying with the statute of Michigan as to alienation of mining property, *because the complainant had acquired no title in fee;* the determination of the federal question. There is no force in this position of defendants' counsel.

Second, It is further claimed by council, on the 8th page of their brief, that the determination of the court was, "that the complainant in error here, by "virtue of its long acquiescence in such *boundary*, and

"in view of the large expenditures made, and to be "made, especially by reason of the *existence of the "pumping contract*, which imposed long and continu- "ous burdens upon the defendant, was *estopped* from "questioning the title and ownership of the Cleveland "Iron Mining Company *in all property north of the "section line.*"

As we have pointed out above, this position has no force, because as we have shown, any suggestion of *estoppel*, in the opinion of the state court, is *based* upon the erroneous holding as to the pumping contract; and so specifically held by Justice Grant; and could not be under the laws of Michigan, as title to real estate cannot be predicated upon an estoppel in parol, as shown by the authorities which we have cited above.

Counsel also state that complainant offered this pumping contract in evidence. That is true, and that too with proof of the agent, Kidder, and of the mining superintendent, Walters, that it was a contract simply for pumping out the lake, and in no way intended or supposed to refer to partitioning of real estate rights. The contract points out what each one is to do, the defendants to operate the pumps after the lake was drained; and the complainant to construct a flume and operate it at its own expense, the whole length of the lake on the south side of the lake, not only to carrying off the water flowing from its own abutting territory, but to take the water from the inlet to the east of the lake, and carry it along and upon the territory of complainant, so as to prevent it flowing into the old bed of the lake; and also to take the water that was pumped by the defendants from the bed of the lake itself. Thus, apportioning what each should do for the common benefit, in keeping the old bed of the lake free from water.

We attach below a copy of this pumping contract.

Third. On page 8 of defendants' brief, counsel also claim, "That the parties on the faith of the pumping "contract had materially changed their condition and "situation, and that it was impossible to restore the "parties to the statu quo existing before the making of "that contract."

Under the laws of Michigan, title to real estate cannot be obtained by *adverse possession short of fifteen years of actual* adverse holding. As we have pointed out above, the statute against alienation of the mining property, forbids alienation by its officers unauthorized by three-fifths of the stock. Justice Grant in delivering the opinion of the state court, by inference affirmed that fact by saying that the complainant *having no title*, the statute *did not apply.* We have pointed out conclusively that under the law of the United States the complainant did have a title, and our whole claim is based upon that predication; and the Michigan supreme court has held, in the language of Justice Campbell, as quoted above, referring to the statute against alienation of mining property, as follows:

"Provision was made for obtaining *and recording* "*evidence of such action.* * * * The *deed is not pre-* "*sumptive evidence of the rightful character of the sale.*" Thus, it is conclusively held by the Michigan supreme court, that it *must conclusively appear* that the statute has been complied with as to alienation of mining property; that it was authorized by a three-fifths vote of all the stock of the company, and that the *production of a deed* executed by the officers of the company *is not presumptive evidence of the rightful character of the sale.* So that the pumping contract, if it had been a deed itself (which we say it is absurd to call it), or even a contract to sell, it would be ineffectual, unsup-

ported by the statutory proof of authority by the stockholders, to show a conveyance or a transfer of any right.

Counsel say in their brief in the paragraph quoted from, "that the court held that it was impossible to "restore the parties to the statu quo existing before "the making of that contract." Such a state, if made, was mere dicta. The holding itself, as seen from the opinion, was that there was an *estoppel by contract*, and the words claimed to be quoted, if made, would be simply the stating of a condition, and has no force as a determination in the case. Besides, from the uncontradicted evidence which we have pointed out above, in the two years that the defendant Cleveland Iron Mining Company carried on the mine upon this disputed territory, which had been found by the complainant itself under the lake, the defendant realized over $100,000 clear profit, over all expenditures of every kind and character, and it has been more than compensated during its two years operation, for all expenditures. It simply drove drifts from its mine north of the lake under the lake to the territory of complainant, and has taken out the ore, without the installing of any new plants of machinery; nothing but the driving of drifts and the bracing up of stopes as it took out the valuable deposit, and lessened the value of the fee, to the injury of the complainant. On the matter of accounting, all equities defendant may have in the matter could be easily adjusted.

We submit that counsel have not in any way pointed out error in our position, that the determination of the federal question is the *underlying ground* of the entire opinion of the Michigan supreme court.

F. O. CLARK,
Solicitor for Complainant.
ALFRED RUSSELL, *of Counsel.*

PUMPING CONTRACT.

THIS AGREEMENT, Made this 17th day of March, A. D. 1892, by and between The Cleveland Iron Mining Company, first party, and The Lake Superior Iron Company, second party and The Pittsburgh & Lake Angeline Iron Company, third party, all corporations organized under the laws of the State of Michigan.

WITNESSETH.

First: That, whereas, the three parties to this agreement severally own all the land surrounding Lake Angeline, in the County of Marquette, State of Michigan, and, iron ore having been discovered under the bed of said lake, it has become necessary to pump out the water of said lake and permanently thereafter drain the bed thereof in order that each of the parties hereto may economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to.

Second. And whereas one B. C. Howell, prior to the date of this contract, had a large pump, suitable for such work and proposed to said first party to contract to pump out said lake and to sell said pump and necessary appliances, all for the sum of thirty-three thousand dollars ($33,000.00), provided he could begin operations immediately, while firm ice remained in said lake, so as to furnish the necessary support for placing the proper timber work in position; and, whereas, said first party, after communicating with said second and third parties and getting their approval, has

entered into a contract with the said Howell to pump out the water of said lake and to purchase said pumping apparatus and appliances for said sum, thus making a large saving in the cost thereof; and, whereas the cost of the continuous drainage of the bed of said lake, after the water thereof is pumped out, is now impossible of ascertainment, and the parties hereto are desirous of fixing the proper proportion of expense, both of the purchase of said pumping apparatus and of the said pumping out of said lake and of the cost of the continuous or permanent drainage of the bed thereafter, to be borne by each, the same being for the mutual benefit of all.

Now, therefore, The parties hereto, in consideration of the premises and of mutual considerations received by each from each, the receipt of which is hereby respectively acknowledged, hereby agrees as follows:

Said First Party Agrees;

First: To bear and pay eight-fifteenths (8-15) of the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake, under the arrangement with the said Howell, to wit, the sum of seventeen thousand six hundred dollars ($17,600.00), and eight fifteenths (8-15) of any additional cost which may be necessarily incurred in the premises, and will also bear and pay one-fifth (1-5) of the value of said pump and appliances after the lake is pumped out, which one-fifth (1-5) thereof is to be deducted, as hereinafter provided, from the amount to be paid by said third party.

Second: After said lake is once pumped out by said Howell, to maintain and operate the said pumping apparatus and plant for the continuous and permanent

drainage of the bed of said lake, advancing all necessary expenses for such maintainment, operation and repairs, and, at the end of each calendar year, to pay and bear such a proportion of the cost thereof during the year preceeding, as the total number of tons of ore mined and produced by said first party from that portion of said lake-bed belonging to it, during said year, bears to the total number of tons of iron produced and mined during such year by said first and second parties jointly from the bed of said lake, and further, to bear and pay two-thirds (⅔) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

Said Second Party Agrees—*First:* To bear and pay four-fifteenths (4-15) of the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake under the arrangement with the said Howell, to-wit: the sum of eight thousand, eight hundred dollars ($8,800.00), and four-fifteenths (4-15) of any additional cost which may be necessarily incurred in the premises.

Second: To bear and pay to said first party, on settlements to be made at the end of each calendar year, such a proportion of the entire cost of maintaining, operating and repairing the plant for the permanent drainage of said lake-bed, as the total number of tons of iron ore produced and mined by said second party, from that portion of the lake-bed owned by it, during such year, bears to the total number of tons of iron ore produced and mined by said first party and said second party from the entire lake-bed during such year, and also to bear and pay one-third (⅓) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

Said Third Party Agrees—*First:* To bear and pay

three-fifteenths (3-15) of the entire cost of the account to be paid to the said Howell under the arrangement of said first party with him, to-wit., three-fifteenths (3-15) of the said thirty-three thousand dollars ($33,000.00), namely, the sum of six thousand six hundred dollars ($6.000,00), and three-fifteenths (3-15) of any additional cost which may be necessarily incurred in the premises, less one-fifth (1-5) of the value of said pump and appliances purchased from the said Howell under the arrangement with him, the value of which is to be estimated as soon as the first drainage of said lake is completed.

Second: To erect and maintain a proper and sufficient flume, so constructed above the present water level of Lake Angeline as to divert and carry away all the surface water or other surface drainage which would otherwise come into the present bed of said lake from all the land lying above the present water level of said lake, and south of the south line of Section Ten (10), as projected through said lake, and also to run into said flume any and all water which the said third party may pump from its mine or mines; which said flume said third party agrees to maintain and keep in repair and in successful operation, diverting such drainage from the bed of said lake until the iron ore to which said third party is entitled, lying in, or under that portion of the bed of said lake lying south of said south line of said section is mined and exhausted, and then, to turn over said flume in good repair to the said first and second parties hereto without charge, and to allow them, thereafter, to operate and maintain the same for the purpose of continuing said drainage, giving the employees of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, allowing them to

make such alterations in said flume and in the direction of the same as may be necessary to successfully accomplish such drainage.

It is mutually agreed, by and between the parties hereto:

First: That each of the parties hereto will respectively pay, on demand, their proper proportion of the amounts due from each, as aforesaid, under the arrangement with the said Howell, when and as called for by W. G. Mather, of Cleveland, Ohio, who is hereby appointed the trustee of all the parties to this agreement, to collect the amount due from each, and to pay the same to said Howell in accordance with the terms of his contract.

Second: That, in case of any dispute arising between the parties hereto, either under this contract or in regard to their joint operations in or about the drainage of the bed of the said lake, all such matters of dispute shall be settled by five (5) arbitrators one to be chosen by each of the parties hereto, and the other two (2) to be selected by the arbitrators so chosen, an award in writing of any three (3) of said arbitrators to be binding and final upon the parties hereto. In case of a dispute, however, between two (2) only of the parties to this agreement, but three (3) arbitrators shall be chosen, one (1) by each of said disputing parties, and the other by two (2) so chosen, and the award in writing of any two (2) so chosen shall be binding and final upon the parties between whom such dispute has arisen.

Any party to this agreement desiring such arbitration shall have the right to the appointment of arbitrators in manner above provided, by serving a ten (10) days written notice of its intention to so arbitrate on the other party or parties to this agreement, who shall

each respectively within the time limited in said notice, select its arbitrator, and, in the event of its failure so to do, then the party desiring said arbitration shall have the right to select an arbitrator in lieu of the one or ones failed to be appointed by the other party or parties, and an award in writing of a majority of the arbitrators so chosen shall be final and binding upon the parties to such arbitration.

Third: This agreement shall extend to and be binding upon the successors, assigns and grantees of the respective parties hereto, precisely as if said respective successors, assigns and grantees had been specially designated herein.

It is mutually agreed, by and between the first and second parties hereto, as follows:

First. That the said first party, through its proper agent or employees, shall keep an accurate and exact account of the cost of operating and maintaining said pumping plant and appliances for the permanent drainage of the bed of said lake, which accounts shall, at all reasonable times, be open to the inspection of the said second party through its agents or employees, and that, before any improve or other machinery or appliances are purchased for the purpose of the permanent drainage of said lake, the said second party shall be consulted concerning the purchase thereof, and its approval obtained; and on or before the tenth day of January of each calendar year, a written statement of the cost of maintaining and operating said drainage plant and appliances for the preceding year shall be sent to said second party by the said first party, together with a full, complete and accurate statement of the total number of tons of iron ore mined during the preceding year from the bed of Lake Angeline by said first party, and, on or before the said tenth day of Jan-

uary of each such year, the said second party shall send to the said first party a full, complete and accurate statement of the number of tons of iron ore mined or produced by said second party from the bed of Lake Angeline during the year preceding.

And the said second party agrees, within ten (10) days from the receipt by it of said account, to pay to the said first party its proper proportion of the cost of maintaining and operating said pumping and drainage plant, as above provided, and also, on demand, one-third ($\frac{1}{3}$) of the cost of such other and additional appliances and apparatus as may have been previously agreed on by the first and second parties hereto, as above provided. *Provided*, however, that if, when said accounts for the permanent drainage during any year are rendered to said second party, said second party is willing, for the succeeding year, to undertake the permanent drainage of said Lake Angeline at a less cost than that incurred by the said first party for the year last preceding, the said second party shall thereupon have the right, during the succeeding year, to take possession of said permanent pumping and drainage plant, together with all appliances, and operate and maintain the same itself, permanently draining the said lake bed during such year, advancing all the cost thereof, in which event the said second party shall keep and render the accounts above required to be kept by the said first party, and the said first party, within the time above limited, after the expiration of any such year, shall pay to the said second party its proportion of the cost of such permanent drainage, in the manner and within the time above provided, and if, at the end of any such year, the said first party is willing to undertake the permanent drainage of said lake for the next succeeding year at a cost less than

that incurred by the said second party, it shall have the right to do so, as above provided, it being understood that either, at the end of any year, shall have the right to operate said permanent drainage plant for the next succeeding year, provided it is willing to guarantee to do so at a less cost than that incurred by the other party during the year next preceding.

If desired by either said first or said second party, the respective statements of the amount of ore respectively mined and produced by each in each year from the respective portions of the bed of Lake Angeline owned by each shall be under oath and sworn to by the agent or employee of each party having knowledge of the facts.

In Witness Whereof the parties hereto have caused these presents to be duly executed in triplicate by their respective officers and their respective corporate seals to be attached as of the day and year first above written.

THE CLEVELAND IRON MINING COMPANY,
By WILLIAM G. MATHER, *President.*
[CORPORATE SEAL].
Attest: FRED A. MORSE, *Secretary.*

Signed, sealed and delivered
in presence of
L. G. MADISON,
FRANK B. WHITE.

THE LAKE SUPERIOR IRON COMPANY,
By G. W. R. MATTESON, *President.*
[CORPORATE SEAL].
Attest: A. C. TENNY, *Secretary.*

W. B. BOSSON,
CHAS. HALL ADAMS.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,

By JAS. LAUGHLIN, JR., *President.*

[CORPORATE SEAL].

Attest: W. G. POLLOCK, *Secretary.*

W. C. QUINN,
WILLIAM F. ROBB,
A. C. DUSTIN,
C. A. JUDSON.

STATE OF OHIO, *Cuyahoga County,* } ss.

Before me, Alton C. Dustin, a commissioner of deeds for the state of Michigan, residing in the city of Cleveland, county of Cuyahoga and state of Ohio, personally appeared William G. Mather, president, and Fred A. Morse, secretary of The Cleveland Iron Mining Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they duly executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of themselves as such officers.

In Witness Whereof, I have hereunto set my hand and official seal, this 17th day of March, A.D. 1892.

[SEAL] ALTON C. DUSTIN,

Commissioner of Deeds for Michigan residing in Cleveland, Ohio.

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss.

Before me, Chas. Hall Adams, a commissioner of deeds for the state of Michigan, residing in the City of Boston, County of Suffolk and state of Massachusetts, personally appeared G. W. R. Matteson, president and A. C. Tenney, secretary of The Lake Superior Iron Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of said corporation, and the free act and deed of themselves as such officers.

In Witness Whereof, I have hereunto set my hand and official seal, this sixth day of July, A.D. 1892.

[SEAL] CHAS. HALL ADAMS,
Commissioner of Deeds for Michigan residing in Boston, Mass.

STATE OF PENNSYLVANIA, }
Allegheny County, } ss.

Before me, William F. Robb, a commissioner of deeds for the state of Michigan, residing in the city of Pittsburgh, County of Allegheny and state of Pennsylvania, personally appeared James Laughlin, Jr., president of The Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such president, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and

that the same is the free act and deed of himself as such president.

In Witness Whereof I have hereunto set my hand and official seal this twentieth day of August, A.D. 1892.

[SEAL] WILLIAM F. ROBB,
Commissioner of Deeds for Michigan,
residing in Pittsburgh, Pa.

STATE OF OHIO, }
Cuyahoga County. } ss.

Before me, Alton C. Dustin, a commissioner of deeds for the state of Michigan, residing in the city of Cleveland, county of Cuyahoga and state of Ohio, personally appeared William G. Pollock, secretary of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such secretary, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such secretary.

In Witness Whereof I have hereunto set my hand and official seal this 22nd day of August, A. D. 1892.

ALTON C. DUSTIN,
[SEAL.] *Commissioner of Deeds for Michigan,*
residing in Cleveland, Ohio.

SUPREME COURT OF THE UNITED STATES.

The Pittsburg and Lake Angeline Iron Company, *Plaintiff in Error,* *v.* The Cleveland Iron Mining Company, and The Lake Superior Iron Company, *Defendants in Error.*	*Case No. 17,363.* *Term No. 260.*

Writ of Error to the Supreme Court of the State of Michigan.

Brief for Complainant and Appellant on Motion to Dismiss the Writ of Error, and on Hearing.

STATEMENT OF FACTS.

The complainant and the defendants are mining corporations organized under the laws of Michigan, and are operating mines in Marquette County, Michigan, Lake Superior Iron District. They have acquired title to all of the fractional subdivisions of lands surrounding Lake Angeline, a small inland lake, covering an area of 148.61 acres, and which is entirely in sections 10, 11 and 15, Township 47, N. Range 27 W., as shown on a map between pages 34 and 35 of the record, where also appears the United States government field notes, showing the courses and distances of the meandered

line of said lake, as certified by the Commissioner of the United States General Land Office.

The complainant is owner of government *fractional* subdivisions, lots 2, 3, 4 and 5 of said section 15, all lying south of the lake. Complainant acquired title to these lots over thirty years ago, and has been in possession and mining on them ever since. This title was acquired through parties who purchased and obtained patents from the United States government. (See pp. 30 to 33 of Rec.)

The defendant, The Lake Superior Iron Co., is the owner of *fractional* government lots 4 and 5, in said section 10, fronting on the lake to the north and west, and is also the owner of the mineral right under government lot 6, in said section 10, which lies to the south of the lake, and north of the section line between said sections 10 and 15. The *surface* of said lot 6 is owned by the complainant, conveyed to it by the defendant, the Lake Superior Iron Company. Lot 6 is very small, containing only .35 of an acre, aside from the territory under the lake, appurtenant thereto, as a riparian right.

The Cleveland Iron Mining Co. owns lots 2, 3 and 7, in the southeast quarter of section 10, and lot 1 in the southwest quarter of section 11. These subdivisions constitute the entire surroundings of the lake (see map p. 35 Rec.). This is admitted by the answers of both defendants (see p. 24 Rec.). These several ownerships, as above stated, are alleged in the bill of complaint (see pp. 1 to 16 of Rec.), and are admitted in both answers (see p. 24 Rec.).

Paragraphs 5, 6 and 7 of the bill of complaint alleges that complainant acquired title to government lots 2, 3, 4 and 5, of said section 15, by mesne conveyances from William Petit, John Burt and others, who were

patentees from the government. The patent to William Petit was dated in 1852. Patent to John Burt was dated the 3rd of September, 1853. These facts are not contradicted. (See pp. 5 to 12 and 30 to 33 of Rec.)

The Lake Superior Iron Co. acquired title by conveyance from Isaiah Briggs, patentee. His patent was dated May 2, 1851. (See p. 33 of Rec.)

The Cleveland Iron Mining Co. acquired title by conveyance from Lorenzo D. Burnell, patentee from the government, dated July 2, 1850. (See p. 33 of Rec.)

These conveyances transferred to complainant lots 2, 3, 4 and 5, of said section 15, and to defendant, The Lake Superior Iron Company, lots 4, 5 and 6, and the northwest quarter of the southwest quarter of said section 10; and to the defendant, The Cleveland Iron Mining Co., lots 2, 3 and 7 of the southeast quarter of section 10, and lot one of the southwest quarter of the southwest quarter of section 11; and the balance of the up land in the east half of section 10 and the west half of section 11, all in Township 47, N. Range 27 W. These several ownerships, as above stated, so far as the *up land* is concerned, are not in dispute in this case.

II.

FEDERAL QUESTIONS INVOLVED.

The *fundamental* controversy in this case arises from conflicting claims as to riparian ownership of the land under said lake, acquired under the several patents from the U. S. government. The bill of complaint was filed in the state court in one of the circuits of the upper peninsula of Michigan, known as the Lake Su-

perior District. Relief prayed for was denied at the circuit, and complainant appealed to the supreme court of the State; and relief was also denied there, and the case is here for review upon writ of error. We claim that it is properly here by writ of error to the supreme court of Michigan, under the provisions of section 709 of the Revised Statutes of the United States, which provides that, "*Where any title, right privilege or immunity, is claimed under the Constitution, or any Treaty or Statute of, or Commission held, or authority exercised under the United States, and the decision is against the title right, privilege or immunity, specially set up or claimed by either party under such treaty, Statute, commission or authority, may be re-examined, and reversed or affirmed in the Supreme Court upon writ of error,*" etc. The right of review, by writ of error from this court, to the supreme court of the State, was held by this court to exist under the provisions of this United States Statute, in the case of Shiveiy v. Bowlby, 152 U. S. 10—a case removed from the supreme court of the State of Oregon to this court. That case and the one at bar are very similar.

The defendants deny that there is any federal question involved. Complainant insists that there is not only a federal question involved, but that all other determinations by the Michigan supreme court rest upon it. The complainant in the fifth paragraph of its bill alleges that it acquired title to the land described as "fractional lot" 5, Sec. 15, Township 47, N. Range 27 W., through a patent from the United States government to John Burt, dated Sept. 3, 1853, and mesne conveyances to it. That it also acquired title to land described as "fractional" lots 3 and 4, in said section 15, through a patent issued to William Petit by the United States government, and mesne conveyances to it. That

it also acquired title to lot 2 in similar manner from the United States government, and mesne conveyances to it. That these lots were surveyed by the United States government as "fractional" and had a frontage on said Lake Angeline; and that it acquired title *under* the waters of this small inland lake to its center, as riparian owner, in proportion to its shore frontage. (See paragraphs 5, 6 and 7 of bill.)

One of the defendants, the Cleveland Iron Mining Company, in its answer alleges, that by virtue of a United States patent to Burnell, and mesne conveyances to it, it became the owner of a large portion of the said territory under the lake claimed by complainant as riparian owner; and the Cleveland Iron Mining Company alleges, in paragraph 4 of its answer (p. 23 of Record), that, "It was the intention of the government "to convey to the said Lorenzo D. Burnell (through "whose patent it claims), the entire east half of section "10, and the entire west half of section 11, described "in the bill, to the full extent and limit of the section "line of said section, *as bounded on the west by the north "and south center line of section 10, and on the east by "the north and south center line of section 11; and on "the south by the south section line of sections 10 and 11, "regardless of the meander line of said Lake Angeline.* "That it was the intention of both the government and "the grantee under and by virtue of the *terms of said "patent*, that the patentee should have the *full limit "of said two half sections as aforesaid;*" to the extent of 640 acres, the same as though Lake Angeline were not there.

It appears that the complainant alleges ownership to *about thirty acres* of land under the waters of said lake and to its centre, opposite its shore frontage, lying north of the south line of section 10 (if extended

through the lake); and alleges that it now holds the title to the same as riparian owner under the patents from the United States government; and that said title by virtue of said riparian ownership extends to the center of the lake, as it was when the patents were executed. (See portions of paragraph 7 of the bill of complaint, pages 10 and 11 of the Record. Also see map Exhibit A attached to bill of complaint, between pages 14 and 15 of the Record. Also complainant's Exhibit F of the evidence, between pages 40 and 41 of the Record).

And also evidence of mining engineer, E. F. Bradt, commencing with page 36, extending to and including page 42 of the Record.

From this evidence and said maps and by the allegations of the bill, and the other proof, it appears that the complainant alleges and claims ownership to the center of this inland lake, as riparian owner of that portion of the land under the lake lying between government meander corners 13 and 16 of the lake on the south side; said meander corners being at the intersection of section line between said sections 10 and 15, with the said meander lines of the government, as they cross the said south line of section 10. The disputed territory is surrounded on map Exhibit "F", page 42 of the Record, by said south line of section 10 between said meander corner 13 and 16, and dotted line from said meander corner 13, to a point marked "center" of said lake; said dotted line being by course and distance south 66 degrees and 16 minutes west 32.28 chains; and also by dotted line from said meander corner 16 to said "center" by course and distance north 51 degrees and 49 minutes west 20.75 chains, less the *mineral* right under lot 6 lying between meander corners 14 and 15 on the said south line of section 10; which last named

meander corners are also connected with said "center" by dotted lines; the one from meander corner 14 being north 26 degrees and 53 minutes east 14.58 chains; and the other south 2 degrees and 37 minutes west 12.84 chains (see Exhibit "F", page 42 of the Record). The complainant, as stated above, owned the surface of this lot 6 and to the center of the lake by deed from the Lake Superior Iron Company, conveying lot 6 of said section 10 to the complainant. The acreage of the territory thus surrounded, and as appears on Exhibit "F", page 42 of the Record, is figured in four separate subdivisions, one part lying to the west of the north and south center line from quarter post on the south line of section 10, extending through and across the lake to the north, amounting to 14.92 acres. Second—the territory opposite lot 6 to the center of the lake between the dotted lines just referred to amounting to 4.05 acres. Third—the acreage between the dotted line from meander corner 15 to the center of the lake to the point marked "center" on the map Exhibit A, amounting to 10.84 acres. The total acreage formerly covered by this inland water is testified to by the engineer Bradt, as well as the total frontage along the lake; and the relative proportion of ownership in this lake, according to the relative frontage, appears at the right hand corner of complainant's Exhibit F, between pages 40 and 41 of the Record.

The witness Bradt testified to measurements and mathematical computations of the same, and from these computations we find that when we add together the territory under the lake south of the dotted lines mentioned, running from said meander corners 13 and 16 to the "*center*" of the lake, and north of the south section line of 10 we have an amount equal to 38.73 acres, 5.10 less than the amount of relative acreage be-

longing to complainant in proportion to the shore frontage, as shown by the figures in the northeast corner of the map, made by engineer Bradt.

What complainant claims is, that it is the owner of the territory under the waters of the lake by virtue of its riparian right to such portion of the lake to its center, as will be in proportion to its shore frontage; and that each of the defendants are entitled to a similar portion of ownership, adjacent to their shore frontage and ownership.

The defendant the Cleveland Iron Mining Company, in its answer denied complainant's ownership of the territory north of the south line of section 10, projected east and west through the waters of said lake, and asserted its ownership to all of the land under the waters of the lake claimed by the complainant, and north of said south line of section 10, if projected east and west through the lake, and lying east of the north and south center line of section 10 from the quarter post; the Cleveland Iron Mining Company claimed to own this territory under the *patent* to Burnell, and mesne conveyances to it; and asserted such claim in its answer, as appears upon pages 23 and 24 of the Record; and which we have quoted above.

Thus, by pleadings, there is alleged a conflict of title between complainant and defendant the Cleveland Iron Mining Company, arising under *conflicting patents from the United States;* the complainant asserting ownership by virtue of riparian rights appurtenant to its shore frontage to the center of the lake, as acquired by its patents (see pp. 30 to 33 of the Record). The Cleveland Iron Mining Company asserting title by virtue of a *specific* description in the patent to Burnell conveying "the east half of section 10 and the west half of section 11, in Township 47 N. Range 27 W., etc., (see p. 33 of the Record)

Under such description, the defendant The Cleveland Iron Mining in its pleadings asserted and claimed that such description conveyed to its grantor not only the *upland* and the "fractional" lots abutting on the waters of the lake; *but also all of the territory which would lie north of the south line of section 10 if projected as above stated, and within the limits of the east half of section 10 and the west half of section 11; if the south* line of section 10 was projected east and west through the waters of the lake (see pp. 23 and 24 of Record); and it further claimed that the provision in the Burnell patent that it was the east half of 10 and the west half of 11 was controlling; and by metes and bounds gave it the full 640 acres which would be contained in the east half of section 10 and the west half of section 11, had there been no inland lake within the limits of that territory.

Thus, title to about thirty acres of mining territory adjacent to complainant's mine, under the lake and extending from its center to the south line of section 10 if projected east and west through the lake, is in dispute in this cause, complainant and defendant *each claiming it through patents from the United States government.*

As we have shown, the pleadings assert *conflicting ownership* acquired from the government through United States patents; and this presents the *fundamental federal questions* involved in this case, viz: did the complainant acquire title to the center of the lake by virtue of its ownership of said government lots 2, 3, 4 and 5; or, did defendants obtain title by virtue of their several patents, to a point where the south line of section 10, if projected east and west through the water of the lake, would run?

It appears that the patentees through whom the

complainant acquired title, received their patents describing the lands purchased, either as lots 2, 3, 4 and 5 of section 15, or described as "fractional" portions of section 15; in fact the patents referred to the lots in describing them as "fractional" lots, containing a certain acreage (see pp. 30 to 33 of the Record). The patent to Burnell, through whom The Cleveland Iron Mining Company claims, contains the following description: "The east half of section 10 and the west "half of section 11, in township 47 N. of range 27 W., "*containing five hundred and fifty-five acres and fifteen "hundredths of an acre*, according to the official plat of "the United States government" (see p. 33 of Record).

Under the pleadings and proofs, with this federal question thus presented, the supreme court of Michigan specifically passed upon this federal question in various ways, and in one place in the following language:

"*The Cleveland Iron Mining Co. claimed title by "virtue of the original patent. Complainant owned no "no specific piece of land north of the section line*, even "under its own theory; *which could be measured by "metes and bounds.* How much, if any, it owned could "only be determined by agreement, or the decree of a "court of equity."

As will be noticed, this is a direct determination of the *federal question* involved, as to title acquired under conflicting United States patents; and not only presents a federal question, but a *fundamental one*, upon which the other determinations of the court in this case rest; as will be seen by further review of that opinion. With all respect for that distinguished court we say, its holding is erroneous; because the abutting owners, either acquired title to the center of the lake, by virtue of the riparian rights appurtenant to their abutting

ownerships under the laws of the United States, or they did not. If they did acquire such real estate title, the *limits* of the ownership, could be fixed by metes and bounds, or *disputed methods* of locating those metes and bounds could be *settled* by the judgment or decree of a court where all disputes as to ownership must be settled, if not amicably adjusted without litigation; and the fundamental error of the supreme court of Michigan is as we allege, that it held that "The Cleveland Iron Mining Co. *claimed title by virtue "of the original patent. Complainant owned no specific "piece of land north of the section line,*" etc. Thus holding title in the Cleveland Iron Mining Co., and *no title* in the complainant as to the disputed territory. *This is the real issue in this case. All other conclusions of the court rest upon it.*

Counsel for the defendant, The Cleveland Iron Mining Co., in their brief, on the motion to dismiss the writ of error in this case served upon us at the time of this writing presents no argument and cites no authorities to show that these facts do not present a federal question. They confine themselves to the simple statement that "we do not think any federal question exists in the case. That this federal question is the *fundamental* controversy, as shown by the pleadings and the proofs, there can be no doubt; and where such issues exist in the supreme court of a state, and are passed upon as the *fundamental* determination of the *entire* controversy, the right of removal to the supreme court of the United States exists under the provisions of section 709 of the Revised Statutes of the United States, which statute we have quoted above.

Referring again to Shively v. Bowlby, 152 U. S. 10, we quote from the language of Mr. Justice Gray, delivering the opinion of the court as follows: "This

"case concerns the title to certain lands below high "water mark in the Columbia river in the state of "Oregon. The defendant below, now plaintiff in error, "claimed under United States, and the plaintiff below, "now defendant in error, claimed under the state of "Oregon. The judgment against its validity proceeded "upon the ground that the grant from the United "States upon which it was founded passed no title or "right as against the subsequent deed from the state "in the lands below high water mark. *This is a direct "adjudication against the validity or a right or privilege "claimed under the laws of the United States, and pre-"sents a federal question within the appellate jurisdic-"tion of this court.* Revised Statutes, section 709. "That jurisdiction has been repeatedly exercised with-"out objection or doubt in similar cases on writs of " of error to the state court.

St. Paul & P. R. Co. v. Schurmeir, 71 U. S. (7 Wall.) 272.
Packard v. Bird, 173 U. S. 661.
Knight v. U. S. Land Association, 142 U. S. 161.

"In this case the supreme court of Oregon held, that "the complainant had no title by virtue of riparian "rights."

The supreme court of Michigan, as we have pointed out under similar conditions held the same thing in this case, that complainant "*owned no specific piece of land north of the section line.* See 76 N.W. Rep., page 403. Also the same opinion by Chief Justice Grant, page 262 of Record.

The case of Shively v. Bowlby, 152 U. S. 10, is directly in point, and the language of Mr. Justice Gray in that case applies with equal force to the case at bar. Our claim in the bill of complaint is that the complainant *acquired title to the land under the lake to its center* by

virtue of its abutting ownership under the patents, and we not only allege this in the bill, but we point it out on map Exhibit "A", attached to the bill of complaint, which appears between pages 14 and 15 of the Record, and on said map Exhibit "A", we specifically point out how, by convergent lines to a common "*center*", under our theory of partition, an equitable designation of border lines of division can be established, so as to give a relative proportion of the lake to each owner of the shore frontage, in proportion to their shore ownership. Whether we are right as to that mode of equitable apportionment, and whether those lines have been equitably located on our map Exhibit "A", is of course for the court to determine and locate them where it will be equitable.

We have pointed out the lines enclosing the ownership of complainant in the lake; they enclose a territory of five acres and ten hundredths of an acre *less* than the relative proportion of the lake frontage would allow complainant to the total area of the lake.

The defendant, The Lake Superior Iron Co., in paragraph 6 of its answer alleges, "This defendant admits, "that the abutting owners upon said Lake Angeline "are the owners of the land and mineral under said "lake; but *denies* that all the said owners, and particularly *that the said complainant is the owner of the "land under the waters of said lake to the center of said "lake;*" and in paragraph seven of the same answer, the same defendant alleges, "This defendant *denies*, "that said complainant *is entitled to any such portion "of the bed of said Lake Angeline, as is claimed by it "in* said paragraph 7 of its bill, or that it is entitled to "or the *owner of any portion of the bed of said lake "situated in said section 10*, except such riparian rights "as it is entitled to by reason of its purchase of said lot

"numbered 6 from this defendant, as hereinbefore "stated, excluding all mineral mining rights therein."

Thus, the defendant, The Lake Superior Iron Co., by its answer *denies the title of complainant*, as does the defendant, The Cleveland Iron Mining Company, and as we have pointed out above, the supreme court of Michigan held, complainant "*owned no specific piece* "*of land north of the section line, even under its own* "*theory, which could be measured by metes and bounds.*"

In speaking of the section line, referring to the south line of section 10, if projected east and west, through the lake; the court further held: "How much, if any, "it owned could *only* be determined by agreement, or "the decree of a court of equity."

Thus was presented a conflict of title under the patents of the United States goverment as to both the defendants.

This action was brought in equity for the *partition* of the territory under the lake among the abutting owners, according to their ownerships by the equitable method marked out in Lincoln v. Davis, 53 Mich. 390, in the language of Justice Campbell, which is as follows: "I agree that it depends on the law of the "state, how far rights may be exercised consistently "with public easements of navigation in the submerged lands; but I regard it *as settled by the common law* "*of this state that such rights exist, so far as they can* "*be reasonably enforced and identified.* * * * In "carrying out lines of ownership in narrow streams it "is easy to find the general course of a stream and to "draw lines perpendicular to that course from the terminal shore lines; but on lakes all lines from the shore "line *tend to converge in some central part of the lake;* "and while irregularity of shape prevents drawing "them to a common center, they must, if protracted,

"cross each other in a perplexing way. The rule "adopted in such waters where the whole surface "could be apportioned has *always been to divide the "water area in proportion to the shore frontage;* and "*never* to attempt any division by lines run from the "shore from such parts of the lake as are substantially "adjacent to the shore. In some cases by a fair parti- "tion a shore owner would by his extent of shore line "obtain a share beyond the center; but it seems *im- "possible* if the whole water is to be regarded as divid- "ed up, to reach a division without *some proceeding in "the nature of a partition, which would fix the various "possessions.*"

Thus establishing the rule of *apportionment by convergent lines* to a common "*center*" from the extremity of adjacent ownership, as we have described: The proposed division of the lake is as appears on map Exhibit "A" attached to said bill, and as also appears on map Exhibit "F" of the evidence (see p. 40 of Record). This mode of division apportions the lake into segments, practically in proportion to the length of the adjacent frontage owned by each. There can be no question that such division would be absolutely accurate if the lake was exactly round; but as suggested by Justice Campbell, the shore is usually irregular in form. Therefore, a division can only be arrived at in a manner most reasonable by an equitable apportionment under the direction of the court.

In the case of Jones v. Lee, 77 Mich. 40, Justice Campbell, delivering the opinion of the court, used the following language: "If this body of water were "not navigable, and if all its waters could in any way "be apportioned among the riparian proprietors for "any lawful purpose, it is evident that it could not be "done by reference to any *filium aquæ*, or middle

"thread; but must be done by the same rule of propor-
"tion which probably could only be got up by some
"*partition proceeding*, in as much as such waters are
"common for all ordinary purposes."

This quotation from 77 Mich. is cited with approval in Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 237.

In the case of Hardin v. Jordan, 140 U. S. 402, this court used the following language: "If there should "arise any dispute between the plaintiff and other ri-
"parian owners of land, situated on the margin of the
"lake, as to the *convergence of the side lines* of the
"plaintiff's land in the lake; it can be disposed of by
"the parties themselves, or *by resort to equity*, or to
"such other form of proceeding as may be proper."

Thus, by this court, as well as the supreme court of Michigan, it has been held that it would not be proper to divide the territory of an inland lake similar to the one in question by undertaking to divide it filium aquæ, or at the middle or thread of the stream, as is done in dividing the territory under the waters of a river; but that it should be *by convergent lines to a common center, equitably determined by the court;* and that this be done as closely as can be under the circumstances, though it can never be accurate; but whatever may be the rule adopted for *partitioning* such inland lakes, we think there can be no question that the *actual title* to the submerged territory under the lake *belongs to the abutting owners* to the *center* of the lake or stream; the same to be apportioned in some equitable way between them, and that such title is vested in the purchaser of the lots abutting upon said inland water.

In the case of Murdock v. Myer et al, 87 U. S. (20 Wall.) 590, and succeeding pages, it was held that, "It "has been many times decided by this court on motion,

"*to dismiss this class of cases for want of jurisdiction;* "*that if it appears from the record, that the complainant* "*in error, raised and presented to the court by pleadings,* "prayer for instruction, or other appropriate method, "*one* of the questions specified in the statute (Sec. 709), "and the court *ruled against him, the jurisgiction of* "*this court attached;* and we must hear the case on its "merits."

Rector v. Ashley, 6 Wall. 142.
Bridge Proprietor v. Hoboken Co., 1 Wall. 116.
Fireman v. Nichol, 8 Wall. 44.
Armstrong v. Treasurer, 16 Peters 281.
Crowell v. Randall, 10 Peters 368.

It is stated, from the language of section 709 of the Revised Statutes of the United States, that the right to a writ of error from the supreme court of the United States to the supreme court of the state exists, whenever a right or title is asserted or claimed, and set up by either party under the statutes or decisions of the United States, or under its authority.

"A federal question is presented, *when* there is in- "volved a *controversy as to riparian rights acquired* "*under the laws of the United States.* A case arises "under the laws of the United States when *its proper* "*decision depends on the construction of the United* "*States law.*"

Cohens v. Virginia, 6 Wheat. 264, 379.

"*What a land patent conveys, is clearly a question of* "*United States law;* and upon this the court is to pass, "and its decision may be reviewed under the 25th sec- "tion of the Judiciary Act. The principle has been "repeatedly recognized, that *when* the question *in any* "*court, state* or federal, *is whether the title to land which* "*had once been the property of the United States, has*

"*passed, that question, must be resolved by the laws of "the United States.*"

Wilcox v. Jackson, 13 Peters 577.
Page v. Peters, 70 Wis. 182.
Wisconsin R'y. Co. v. Wis. P. Land Co., 71 Wis. 99.

In the case of Saward v. Denny, 158 U. S. 180, 183, Chief Justice Fuller stated this jurisdictional question as follows:

"First. The certificate of the presiding judge of the state court as to the *existence* of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

Powell v. Brunswick Co. Board of Supervisors, 150 U. S. 433, 439.

"Second. That the *title, right, privilege,* or immunity must be *specifically set up or claimed* at the proper time and in the proper way.

Miller v. Texas, 153 U. S. 535.
Morrison v. Watson, 154 U. S. 111.

"Third. That such claim cannot be recognized as properly made, when made for the *first time in a petition* for a re-hearing after judgment.

Loever v. Schroeder, 149 U. S. 580, 585.

"Fourth. That the petition for the writ of error, forms no part of the record, upon which the action is taken here.

Butler v. Gage, 138 U. S. 52.

"Fifth. Nor do the arguments of counsel, though the *opinion* of the state courts *are now made such by rule.*

Gibson v. Schouteau, 75 U. S. 314.
Parmalee v. Lawrence, 78 U. S. 36.
Ross v. U. S. M. Co., 108 U. S. 447, 484.
United States v. Taylor, 147 U. S. 665, 700.

"Sixth. The right on which the party relies, must have been called to the attention of the court in some proper way; and the *decision* of the court must have been *against the right claimed.*

Hoyt v. Thompson, 66 U. S. 518.
Maxwell v. Newbold, 59 U. S, 18 How. 515.

"Seventh. Or, at all events, it *must appear from the record*, by *clear and necessary intendment*, that the *federal question* was *directly involved*, so that the state court could *not* have given judgment *without deciding it*. That is, a definite issue, *as the possession of the right*, must be distinctly *deducible from the record* before the state court can be held to have *disposed of such federal question by its decision.*"

Powell v. Brunswick Co. Board of Supervisors, 150 U. S. 433, 439.

We insist, that tested by these principles, so clearly stated by the Chief Justice, that both by pleadings and proofs and by a clear determination of the supreme court of Michigan upon the issue thus raised, a federal question was not only presented by the pleadings in this case and passed upon by the supreme court of Michigan, but that this federal question thus presented and determined *was the basis of the entire opinion and conclusions arrived at;* that is, of *all* the conclusions of the supreme court of Michigan which *defeated the title of complainant* in that court.

As supporting the above opinion of Chief Justice Fuller, see

Baldwin v. Kansas, 128 U. S. 52, 56.
Kaukauna W. P. Co. v. Green Bay M. C. Co., 142 U. S. 254.
C. & N. W. Ry. Co. v. Chicago, 164 U. S. 454, 457.
Chicago & R. Co. v. Chicago, 166 U. S. 226, 230, 242.

Oakley Stave Co. v. Butler Co., 166 U. S. 648, 653, 654, 666.
Levy v. Superior, 167 U. S. 175, 177.

"A judgment which *rejects the claim*, but avoids all *reference to it, is as much against the party's right within the meaniug of* section 709 as if it had been specifically referred to and the right directly refused."

Chapman v. Goodman, 123 U. S. 511, 548.
O'Neil v. Vermont, 144 U. S. 323, 358.

"And if the decision of the supreme court of a state is against the plaintiff in error, and *must necessarily have involved a federal question, duly claimed in the state court, the jurisdiction of this court exists to review the case.*"

III.

Was the Decision of the Lower Court Based upon Ground Independent of the Federal Question?

We have pointed out that a federal question is at issue in this case. We will now consider whether the supreme court of Michigan decided the case adversely to complainant upon grounds independent of the federal question. We assert that all of its conclusions, *were based upon and collateral to the federal question, and cannot be separated from it;* the lower court having held, as we have pointed out, that "complainant *owned* "*no specific piece of land* north of the section line (south "line of section 10), even under its own theory, *which* "*could be measured by metes and bounds.*" See 76 N. W. Rep. 403. It based all its other determinations in the case upon that, as we will point out.

It was claimed by the defendants upon the hearing, that the president and secretary of the complainant company entered into a contract, dated the 17th of March, 1892, for *pumping* out Lake Angeline, and that this contract substantially amounted to a *conveyance* by complainant to defendants of all its rights to the territory under Lake Angeline, lying north of the said south line of section 10 projected through the lake. This pumping contract is upon page 88 of the Record.

The complainant denies any intention on the part of the president and secretary of the company to do more in that contract than to provide for the *pumping* out of the lake; and denies any authority on the part of its officers to make any other or further contract than simply for that purpose.

It appears from the testimony of Alfred Kidder, who was the local agent in charge of the mining operations of the complainant at the mines in Michigan, that the *entire negotiations* for the making of this contract were between himself as mining agent of complainant, and Mr. Mills, mining agent of the Cleveland Iron Mining Company who acted for his company and for the defendant the Lake Superior Iron Company (see p. 88 of Record), and for that purpose only; and the complainant, upon the hearing of this case, as a defense insisted this pumping contract could not be construed as conveyance of land, because the statutes of Michigan *prohibited* alienation of the mining real estate of complainant, unless the directors of the company were *authorized* so to do by a *vote of three-fifths in interest* of the entire stock of the company actually present, or legally represented at some stockholders' meeting called for that purpose, as provided in section 4052 of Howell's Annotated Statutes of Michigan. Which statute is as follows:

"No alienation, division, sale or mortgage of any, or "any part of the *mine, works, real estate* or franchise "of any corporation mentioned in the first section of "this act, shall have any force or effect, or pass any "title thereto, or interest therein, *unless expressly "authorized by the vote of three-fifths in interest of the "entire stock of said company, actually present or legally "represented at some meeting of stockholders called and "notified, in accordance with the provisions of the preced-"ing section of this act*, except the surface right to land "for village lots, or land not required for mining pur-"poses, from which the timber has been removed. Pro-"vided rights of way and depot grounds for railroads, "and rights of way for railways, may be conveyed by "the proper officers of such corporations, when author-"ized by a vote of the majority of the directors thereof "at any meeting regularly held."

The next section of the Michigan statute, 4053, provides for *the mode of proving such action by the stockholders*, and for preserving evidence of such action, that it may appear upon the records as a part of the chain of title. The statute is as follows:

"Any person desiring to perpetuate evidence of the "facts on which the legality of any alienation, division, "sale or mortgage of any of the real estate, mine, works, "or franchises of any such corporation depends, may "procure:

"First. An affidavit of the person or persons who "served the notices of the meeting at which the same "were authorized on the several stockholders, showing "the time and manner of such service.

"Second. An affidavit of the publication of the no-"tice of such meeting, if such notice be published, to "be made by the printer of the newspaper in which the "same was published, or by some one in his employ "having knowledge of the facts; and

"Third. A transcript of the record of proceedings of "such meeting, to be verified by the oath of the secre- "tary or other officer of such corporation having cus- "tody of said record.

"Fourth. Said affidavit and verified transcript may "be recorded in the office of the register of deeds of "the proper county in the book of miscellaneous rec- "ords, and when so recorded, the original affidavits "and transcripts, the records thereof, or a certified "copy thereof, shall be prima facie evidence of the "facts therein contained."

This statute not only provides that there shall be no alienation, division, sale or mortgage, of any or any part of the mine, works, real estate or franchise of any corporation mentioned in the first section of this act, unless expressly authorized by the vote of three-fifths in interest of said company actually present, or legally represented at some meeting of stockholders called and notified as provided by the statute as quoted above; but it also provides how proof shall be perpetuated, and how made; that three-fifths in interest of the entire stock of the company authorized the conveyance of its property and franchise, and the statute provides for the recording of such action by the stockholders upon the records of the county, with as much formality as the recording of deeds. There is no proof of any such action in this case, but it appears affirmatively that all negotiations were between Alfred Kidder, local mining agent of the complainant at the time, and Mr. Mills, mining agent of the Cleveland Iron Mining Company, and Mr. Mather, president of C. I. M. Co., and by them for the defendant, The Lake Superior Iron Company, with regard to the pumping contract. (See evidence of Mr. Kidder, p. 88 of Rec. Also evidence of Mr. Mills, pp. 193-194 of Rec.)

As we have said, the defendants claim this pumping contract to be in effect a *conveyance* by the complainant of its *title* to its portion of the bed of the lake, north of the south line of section 10. And the supreme court of Michigan by its decision has sustained title in the defendants—not by ignoring the statute against alienation of corporate property, to which we have referred, but by *first holding as we have pointed out above*, that *the complainant had acquired no title in fee to the land in dispute*, and that, "The complainant *owned no* "*specific piece of land north of the section line*, even "under its own theory, *which could be measured by metes* "*and bounds*. How much, if any, it owned could *only* "be determined by agreement, or a decree of a court "of equity."

Now, we submit, that it is difficult to understand what the supreme court of Michigan meant by this holding. We can only surmise that the learned judge who wrote the opinion had in mind, that the right acquired by complainant to the territory under the waters of the lake, appurtenant to its shore frontage, was an *inchoate, indefinite right, which did not amount to a title in fee*. That it was a right, if anything, that *could not be measured*, and it must be determined what it was, either "*by agreement, or by the decree of a court of equity.*" The supreme court of Michigan certainly could not have meant that a *title in fee* in land consisting of *about thirty acres*, could "*not be* determined *by metes and bounds*," either under general rules of law or by equitable rules, when disputes existed between the parties as in this case. Even though it was necessary to go into a court of equity to determine the dispute between the parties, we insist that it did not make the title, which the complainant sought to eqitably apportion, any less real estate, or any less deter-

minable by law governing corporate real estate on account of such dispute. So we say, if in determining the federal question, the Michigan supreme court held that the complainant *had no real estate*, no vested title in realty in the disputed territory under the waters of the lake, and therefore its mining agent and superintendent could, under the name of a pumping contract, convey away any rights which it had, under the *theory* of settling boundary lines, or any other theory; then not only was the court in error as to the federal question, but was *basing* its conclusion as to the validity of the contract made by the three mining agents of the companies, so far as conveying title, *upon the erroneous determination of the federal question;* and such determination as to the conveyance of any rights in the fee by said pumping contract was therefore *collateral to and dependent upon the prior erroneous determination of the federal question referred to, viz: That the complainant had no title in fee or real estate interest in the disputed territory.*

Thus, it is plain that the supreme court of Michigan, in holding that the Michigan statute against alienation of mining real estate did not apply, did so under the theory or conclusion previously stated, that the "*complainant owned no specific piece of land north "of the section line*", and that if it owned any right there, it was simply an inchoate, indefinite right, the nature of which is not explained by that court.

Now, it has been held by this court in the case of Hammond v. Johnson, 146 U. S. 78, as follows:

"It is well settled, that where the supreme court of "a state decides a federal question in rendering a "judgment, and also decides against the plaintiff in "error, upon an *independent* ground *not involving a "federal question; and broad enough to maintain the*

"*judgment*, the writ of error will be dismissed with-
"out considering the federal question." In this case every holding of the supreme court of Michigan is subsequent to and based upon the determination of the federal question in the case, which was that the complainant "owned no specific piece "of land north of the south line of section 10, even "under its own theory, which could be measured "*by metes and bounds.* How much, if any, it owned, "could *only* be determined by agreement or decree of "a court of equity."

Thus determining, it *rejected as inapplicable* the defense that the statute of Michigan against alienation applied because they say that statute applied only to real estate rights. If the Michigan court was right in holding that the complainant owned no real estate title, then, of course, the Michigan statute against alienation of mining property referred to would have no application. But that court being in error in its determination of the federal question, holding that complainant had no title; that error is the *fundamental* one and is the reason given for rejecting the conclusive defense, that the officers of the complainant *could not convey title unless authorized by three-fifths in interest of the stockholders of the company.* If the holding of the court *claimed* to be an *independent* one, involves the prior determination of a federal question and rests upon it and is ancillary to and subservient to it and is not broad enough and distinct enough to stand alone without such determination, then it is *not* such an *independent* determination. Such we insist is the case at bar. Our contention is,

First. That this pumping contract was not a conveyance of the real estate rights of complainant in any way. That there was no such intention on the part of

even the mining agents and mining superintendents who had to do with making the contract.

Second. That even if they had so intended, that the contract is absolutely void as a conveyance, as it was without the sanction and authorization of three-fifths in interest of the entire stock of the corporation, and that nothing can give vitality to such a contract, to convey the realty of the mining corporation. The only basis upon which the court below holds the contract valid as a conveyance of land is by first holding that the "complainant was *not alienating, dividing or "selling* any of its *real estate* within the language of "the statute. Alienating means in law *a transfer of "title* by conveyance" (76 N. W. Rep. 403. Also p. 262 of the Record).

It is difficult to understand *what* the learned judge delivering the opinion *meant* by the statement that there was no transfer of title, when it is beyond question that the territory lying *between the "center" of the lake and the south line of section 10*, opposite lots 2, 3, 4 and 5 of section 15, amounted as shown by the proof, to *about thirty acres.* What can that pumping contract be but a conveyance of the title of the thirty acres, by whatever name it may be called, if it conveys the rights and title of complainant to said land? But, says the learned judge in the opinion, on the same page from which we have quoted, "It may be said that the *statute "does not apply* to the voluntary adjustment of these "*lines*, but to alienation by deed of conveyance." The circumstances of this case do not show an *adjustment of lines.* It was the determination of *who owned thirty acres of territory acquired from the United States government by patent surrounded by independent lines*, which the bill asked the court to definitely and equitably locate. The learned judge in the court below

speaks of this matter as though it were merely the *adjustment of border lines*, as a line between two lots of a city, as to just where that line should be between adjoining owners. That is not the case. The fundamental inquiry is whether or not the complainant or defendants acquired title to the territory abutting lots 2, 3, 4 and 5 of section 15, under the waters of Lake Angeline, and to its center, amounting to over *thirty acres.*

After stating the facts, the first determination made by Justice Grant in the lower court was as follows: "No fixed rule ever has been, or ever can be laid down "for the '*division*' of the territory covered by these "inland lakes with irregular shores. Each case must "depend upon its own peculiar circumstances and facts. "and as reasonable a *division* arrived at as possible."

See 76 N. W. Rep. p. 401.

This is undoubtedly correct, and was the occasion of our filing the bill. The learned judge does not speak of it there as *simply settling a boundary*, but as a "*division*" of the territory covered by the inland lake, *which it was;* a conveyance, or an *attempted conveyance*, if anything more than a contract for pumping the water was intended.

The next holding in the opinion of Justice Grant on the same page is as follows: "The first obstacle for "the complainant to remove, before resorting to an "equitable apportionment is this contract (pumping "contract), recognized as valid and acted upon for "nearly five years by all parties." It was a contract for pumping and draining the mine only.

The next holding in that opinion is as follows: "We "find that the parties in reliance upon that case, en-"tered into a deliberate contract (pumping contract) "establishing their *boundary line, and determining the*

"*amount of territory belonging to each;* complainant "made the contract with the knowledge that it gained "territory south of the line known to be valuable, while "it *surrendered* territory north of the line not then "known to possess any value."

Thus, the court below holds the validity of the contract, subsequently holding as we have pointed out, because the statute of Michigan against alienation *did not apply.*

Again, on the same page of the opinion, the court below held as follows as to the pumping contract: "The "agreements and settlements of parties, made with full "knowledge of the facts and in reliance upon the law, "ought to be as binding as the judgment of a court in "a particular case * * * Judgments rendered, and "contracts made upon the faith of the law, as enunci- "ated in the decision of the court in the absence of "fraud or misrepresentation, must stand."

And again, "This case therefore, is to be decided "according to existing state of things when the settle- "ment in question took place" (referring to pumping contract); and on the next page of the opinion, the court says: "The sole basis of complainant's claim is, "that the decision of this court, upon the faith of which "the contract was made, was subsequently overruled."

Again holding on the same page, "Does the contract "settle the boundary line, and acquiescence therein, "and the acts done thereunder, *estop* complainant to now "assert a different line? The rule is settled by the de- "cisions of this court, that where *disputed boundary lines* "have been established by express agreement, or under "such circumstances, that an agreement will be im- "plied, and parties have for any considerable time "recognized them, they will be upheld, though title by "adverse possession could not be maintained."

And again, on the same page of the opinion the court held, "If his testimony be true (referring to Kidder, "the mining agent), and for this purpose the company "must stand by its own testimony, there was a dispute, "and it was settled by the agreement." (Pumping contract.)

Again, the court held, "Complainant, however, *in-*"*vokes* the doctrine that *title* to land *cannot rest on* "*estoppel, on account of the statute of frauds, and that* "*a vote of three-fifths of the entire stock of the company* "*is essential under the statute to convey title.* The ob-"vious reply to the first position is, that it is also es-"tablished that the statute of frauds does not apply to "*boundary lines*, and that the doctrine of estoppel will "be applied to the voluntary adjustment of disputed "boundaries."

Again holding, "Under the theory of complaint, "corporations could not settle *boundary* lines without "a meeting of the stockholders, called to pass upon the "*alienation* of its lands, etc."

And then, in the *opinion*, we come to the quotation referred to above, in discussing the federal question: "The Cleveland Iron Mining Company *claimed title by* "*virtue of the original patent.* The complainant *owned* "*no specific piece of land north of the section line*, even "under its own theory, which could be measured by "metes and bounds; how much, if any, it owned could "*only* be determined by agreement, or the decree of a "court of equity."

The above quotations cover the substance of the entire opinion, and the determination of the Michigan supreme court. The holding:

First. That the complainant *had no title in fee.*

Second. That, *having no title in fee*, the contract of the 17th of March, 1892, known as the pumping con-

tract, divided, apportioned and "*conveyed*" *every right which it did have* (the court not determining what that was), and that the *statute against alienation of corporate real estate had no application;* which conclusion *could not* have been arrived at except upon the theory that the determination of the *federal* question as made was correct. Incidentally, the court held that the complainant was estopped *by its contract* (the pumping contract) from asserting any title under the lake, thus *basing* the suggestion of estoppel upon the contract itself, as a valid one.

We submit that the entire determination on all the material questions in this case, were subservient to and *based* upon the erroneous determination of the federal question; and that the jurisdiction of this court should not be ousted, but that the entire record should be reviewed by this court.

It will be noticed that the court below does not intimate that the real estate of a mining corporation can be disposed of by conveyance, without a three-fifths vote of the stock in interest. In fact, by inference, affirms former holdings of that court that it cannot; only says the statute does not apply here.

Justice Cooley, of the Michigan supreme court, in earlier cases, delivering the opinion of that court, referring to this Act protecting stockholders against any acts or omissions of the corporate agent, or other persons, uses the following language: "This act was passed "to protect the interest of stockholders in mining com- "panies. It intends that their mining property *shall "not be conveyed away or mortgaged, except by their de- "liberate action after they have been notified of a proposal "to do so, and have had time to deliberate upon and fully consider it.*"

Beecher v. M. & Rolling Mill Co. 45 Mich. 103, 107.

Lockwood v. Thunder Bay Co., 42 Mich. 539.
Hartford v. Cambria, 80 Mich. 495.

And Judge Campbell, one of Michigan's ablest supreme judges, delivering the opinion of that court, referring to this statute requiring the *recording* of the *action* of the stockholders, referred to above, held: "Provision was made for obtaining and *recording* evi- "dence of such action * * *The deed is not made "presumptive evidence of the rightful character of the "sale."*

M. H. & O. Ry. Co. v. Atkinson, 44 Mich. 167, 168.

Thus holding that it must *affirmatively* appear by proof *not contained in the deed*, that the statute has been complied with. There is no such proof in the record.

In a recent case in the U. S. Court of Appeals, 6th Circuit, 90 Fed. Rep. 637, Judge Lurton, delivering the opinion of the court, construing this statute for the protection of the stockholders in Michigan, used the the following language:

"The general purpose of the statute was to protect "the interest of share holders in mining companies. "In Beecher v. Mill Co., 45 Mich. 103, Mr. Justice "Cooley interprets the act by saying, "It intends that "the mining property shall not be conveyed away or "mortgaged except by their deliberate action. That "the limitation is upon the alienation or encumbrance "of mining property as distinct from property not re- "quired in the conduct of the business for which the "company was organized, is evident from the descrip- "tion of property to which the prohibition applies. "The prohibition is against alienation or encumbrance "*of the mine works, real estate or franchise. By real*

"*estate we must understand from its association with "mine works and franchise that species of real estate "useful or valuable in connection with its mine works or "franchise.* This interpretation is made more evident "by the terms of the proviso which expressly authorizes "by the vote of a majority of the directors the sale of "city or village lots and lands from which the timber "has been removed, not required for mining purposes."

"There can be no estoppel *when there is no legal "power* to do the act, in reference to which it is claimed "the estoppel exists, i. e., parting with this land. The "officers, directors and agents could not by direct con- "veyance transfer title. *Neither can they by acts or "omissions.*"

O. & M. Co. v. O. Co., 130 U. S. 1, 37.
Pa. R. R. Co. v. St. L. R., 118 U. S. 290, 317.

The supreme court of Michigan in its opinion in this case could not have intended to hold, as an independent determination, that a title by estoppel was created, *independent of the pumping contract referred to;* because it has many times been held by the court, that "*title to "land cannot pass by a mere estoppel, shown by parol;* "neither can an apparent title be assailed by the parol "evidence of one who has caused its transfer."

First National Bank of Kalamazoo v. McAllister, 46 Mich. 398-406.

And Justice Cooley, in Hayes v. Livingstone, 34 Mich. 384, held: "*Title to lands can not pass by estop- "pel;* and if the plaintiff claims, *not* the title but the "right of *permanent possession*, this comes to the same "result. Citing Nims v. Sherman, 34 Mich. 45."

And in the case of John Hancock & Co. v. Dix, decided Sept. 14th, 1897, by the Michigan supreme court, 114 Mich. 337, it was held in the language of Justice

Hooker, that "It is well settled in Michigan, *titles in "land cannot rest on estoppel in pais.*"

So it is clear that when Justice Grant uses the language: "The complainant *was estopped by its own con- "tract from asserting any title* under the lake," he referred to estoppel by the pumping contract, and upon the theory that the contract was a valid one for that purpose. So there is no determination by the supreme court of Michigan that does not rest upon the erroneous determination of the federal question.

IV.

The Complainant Acquired Title to the Center of the Lake.

It has been established beyond controversy by the United States courts, that the abutting owner on an inland lake or river not navigable, acquires title to its center, though he pays only for the acreage of the upland, according to the survey of the surveyor general.

In the case of St. Paul & Pacific Railway Co. et al v. Schurmeier, 7 Wall. 272, it was held as follows: "Meander lines are run in surveying fractional portions "of the public lands bordering upon navigable rivers, "not as boundaries of the tract, but for the purpose of "defining the sinuosities of the banks of the stream, "and as the means of ascertaining the quantity of the "land in the fraction subject to sale, and which is to "be paid for by the purchaser. * * * Proprietors "bordering on streams not navigable, unless restricted "by the terms of their grant, *hold to* the *center* of the "stream; but the better opinion is, that the proprietors

"of lands bordering on navigable rivers under titles de-
"rived from the United States, hold only to the stream,
"as the express provision is that all such rivers shall
"be deemed to be public highways. Grants of land
"bounded on rivers above tide water; says Chancellor
"Kent, carry the exclusive right and title of the grantee
"to the *center* of the stream, unless the terms of the
"grant clearly denote the intention to stop at the edge
"or margin of the river; and the public, in cases where
"the river is navigable for boats and rafts, have an
"easement thereon, or a right of passage subject to the
"jus publicum as a public highway. 3 Kent's Co., 11
"Edition 427. The views of the commentator are, that
"it *would require an express exception in the grant* or
"some clear or unequivocable declaration, or certain
"immemorial usage, *to limit the title of the riparian*
"*owner to the edge of the river*, because as the commen-
"tator insists, the stream when used in a grant as a
"boundary, is used as an entirety *to the center of it*, and
"he consequently holds *that the fee passes to that extent.*
"Decided cases of the highest authority affirm that
"doctrine, and it must doubtles be deemed correct in
"most all jurisdictions, *where the rules of the common*
"*law prevail*, as understood in the parent country.
"Except in one or two states, those rules have been
"adopted in this country, as applied to rivers not nav-
"igable, when named in a grant or deed, as a boundary
"to land. Subsequently the same rules were adopted
"by congress as applied to streams not navigable; but
"many acts of congress have provided, that all navig-
"able rivers or streams in the territory of the United
"States offered for sale should be deemed to be and
"remain public highways.

1st Statute at Large, 491.
2nd Statute at Large, 235, 279, 642, 666, 703, 747.
3rd Statute at Large, 349.

"* * * Extended discussion of this topic, however, "is unnecessary, as the court decides to place the de- "cision in this case, upon the several acts of congress, "making provision for the survey and sale of the "public lands, bordering on public navigable rivers; "and the *legal construction of patents* issued under "such official surveys, and sale of such lands, *must "have the same effect* as it would be entitled to receive "if it were incorporated *into the patent*, especially as "there is nothing in the field notes, nor in the official "plat or patent inconsistent with that explicit reserva- "tion. * * * Viewed in the light of these con- "structions, the court does not hesitate to decide, that "congress, in making a distinction between streams "navigable, and those not navigable, intended to "provide that the common law rules of riparian owner- "ship should apply to lands bordering on the latter; "but that the title to lands bordering on navigable "streams, should stop at the stream, and that all such "streams should be deemed to be and remain public "highways."

In the case of Hardin v. Jordan, 140 U. S. 402, the court held as follows: "It has been the practice of the "government, from its origin, in disposing of the public "lands, to measure the price to be paid for them, by "the quantity of upland granted; no charge being "made for the lands under the bed of a stream or *other "body of water.* The meander lines running along, or "near the margin of such waters are run for the pur- "pose of ascertaining the exact quantity of the upland "to be charged for, *and not for the purpose of limiting "the title of the grantee to such meander lines.*"

In Barney v. Keokuk, 94 U. S. 324, and Packard v. Bird, 137 U. S. 661, and Hardin v. Jordan, 140 U. S. 402, it was held: That the beds of streams, above the

flow of the tide, whether actually navigable or not, *belonged to the proprietors of the adjoining lands.*

St. Louis v. Ritz, 138 U. S. 226.

In the case of Hardin v. Jordan, 140 U. S. 402, the court uses the following language: "The disposal of "the present case, therefore, seems to us to require no "further discussion—only an answer to the single ques- "tion *what is the common law in regard to the title to "fresh water lakes and ponds?* And on this subject we "think there can be very little difference of opinion. "Of course, as already stated, there is no question "*where the land fronts upon a fresh* water stream or "river. In such cases the law is perfectly plain. Sir "Mathew Hale states: Fresh rivers of what kind soever, "do of common right *belong to the owners of the soil ad- "jacent;* so that the owners of the one side have of "common right the property of the soil, and conse- "quently of the right of fishing usque ad filium aquæ, "and the owners on the other side, the right of the soil "and fishing under the filium acquæ on their side."

So it is clear, that the complainant acquired title to the *center* of this inland lake. Certainly this is so, unless the patent to Burnell, through which the Cleveland Iron Mining Company claims title by its description, "east half of 10 and west half of 11," carried title to the south line of 10, projected through the lake. No executive of the government, charged with the duty of selling the public lands and issuing the patents, could vary the uniform rule as to title to purchasers by any form of patent of abutting lands on inland lakes, ponds or rivers, as the United States courts have frequently held, that "registers of local land offices are mere sales "agents of the government. The survey and division "of the lands are entrusted to the surveyors. Their "action is conclusive, and the registers are bound to

"sell by the plats furnished them. They can sell in "no other manner."

Kissell v. St. Louis Public Schools, 18 How. 19.
Bagnell v. Broderick, 13 Peters 450.
Barnard v. Ashley, 18 How. 43.
West v. Cochran, 17 How. 403.
Gazzam v. Lessee of Philips, 20 How. 372.

In Gazzam v Lessee of Philips, 20 How. 372, the court held, that the surveyor general had power to make fractional subdivisions of fractional sections of public land containing more than eighty acres. In fact that he had discretion as to the form of division of public lands, and the description of those divisions; the court in that case overruling Brown v. Clements, 3 Howard 650. In fact it is the settled law of the United States courts, that the descriptions as made of the surveys by the surveyor general are controlling; and when the patent is of the lands of a governmental description, according to government survey, and is of a "fractional" portion of land fronting upon an inland lake or water, according to government survey, *these are the controlling words* and limit the amount of land to be paid for to the acreage of the fractional description as determined and entered by the surveyors in their minutes and upon their maps. So the patent to Burnell, which described the land conveyed as the "east half of 10 and the west half of 11, according to government survey", conveyed by metes and bounds only the acreage as specifically stated by the surveyor general as the acreage of each "fractional" lot within the limits of what would be the east half of section 10 and the west half of section 11; namely 555.15 acres, *the specific acreage stated in the patent* and appearing by the government plats offered in evidence to be the acreage of the *uplands* according to government survey; and all title which Burnell obtained under his patent to a portion

of the inland lake (which would be to the center of the lake) was by virtue of the *law of riparian ownership* as referred to above, and not by virtue of the wording of the patent itself; and no title was acquired by Burnell, or conveyed by him to the Cleveland Iron Mining Company beyond the center of that lake.

Section 464 of the United States Statutes at large, provides that the field books of the surveyor general shall be returned by the surveyor general, who shall thereafter cause a description of the whole lands surveyed to be made out and transmitted to officers who may have to superintend the sales, which is to be recorded and be in the possession of the parties who make the sales, and presumptively for use in such sales.

In the case of Parker v. Kane, 22 How. page 11, the court held: "that a description as a lot necessarily re-"fers to the official surveys in the general land office, "to which the court looks for the final determination "of the matter;" and which the statutes of the United States provides shall be the means of finally determining both the description and quantity of lands conveyed.

In the case of Willson v. Hoffman, 70 Mich. 527, the court held as follows: "In granting patents for lands, "it is usual for the government to add immediately af-"ter the statement of the number of acres which the "tract contains, if it be fractional, these words: 'ac-"cording to the official plat of the survey of said lands "returned to the general land office, by the surveyor "general.' Such language, when used, constitutes a "part of the description of the premises conveyed, and "*limits* the purchaser to the tract as marked upon the "plat of the surveyor general. This was so held in "Gazzam v. Lessee of Philips, 20 Howard 372, which

"overruled Brown's Lessees v. Clements, 3 Howard "650. This was the language used in the patent to "Tingley."

Thus, the description in the patent to Burnell, that it was *555.15 acres, according to government survey*, fixed as a *limitation* to the description and amount of the lands conveyed; namely, the fractional lots abutting upon the inland lake in question; and any right acquired under said patent in the land under the lake, was by virtue of riparian ownership. which was *only to the center of the lake.*

In the case of Packard v. Bird, 137 U. S. 661, the court uses the following language: "The disposal of "the present case, therefore, seems to us to require no "further discussion: only an answer to the single ques- "tion—what is the common law in regard to the title "*to fresh water lakes and ponds;* and on this subject "we think there can be very little difference of "opinion. Of course, as already stated, there is no "question where the land fronts upon a fresh water "stream or river. In such case the law is perfectly "plain. Sir Mathew Hale states: '*Fresh rivers of "what kind soever, do of common right belong to the "owners of the soil adjacent;* so that the owners of the "one side have of common right the property of the "soil, and consequently of the right of fishing usque "ad filium aquæ, and the owners on the other side, "the right of the soil and fishing under the filium "aquæ, on their side'."

In the case of Hardin v. Jordan, 140 U. S. 402, the court held as follows: "It has been the practice of "the government from its origin, in disposing of the "public lands to *measure* the price to be paid for them "*by the quantity of upland granted, no charge* being "made for the lands *under* the bed of the stream *or*

"*other body of water.* The meander lines running "along or near the margin of such waters are run for "the purpose of ascertaining the exact quantity of the "upland to be charged for, *and not for the purpose of "limiting the title to the grantee to such meander lines.* "It has frequently been held, both by federal and "state courts that such meander lines are intended for "the purpose of bounding and abutting the lands "granted upon the waters whose margins are thus me- "andered, and that the waters themselves constitute "the real boundary."

St. Paul & P. R. R. Co. v. Schurmeier, 74 U. S. (7 Wall.) 272.
Jefferies v. E. Omaha Land Co., 134 U. S. 178.
P. Marquette Boom Co. v. Adams, 44 Mich. 403.
Clute v. Fisher, 65 Mich. 48.
Revised Statutes of the U. S. Sec. 2395, 2396.

"The beds of streams above the flow of the tide, "whether actually navigable or not, *belong to the pro "prietors of the adjoining lands.*"

Barney v. Keokuk, 94 U. S. 324,
Packard v. Bird, 137 U. S. 661,
Hardin v. Jordan, 140 U. S. 402,
St. Louis v. Rutz, 138 U. S. 226.

"The registers of local land offices are mere sales "agents of the government. The survey and division "of the lands are entrusted to the surveyors. Their "action is conclusive, and the registers are bound to "sell by the plats furnished them. *They can sell in "no other manner.*"

Kissell v. St. Louis Public Schools, 18 How. 19.
Bagnell v. Broderick, 13 Peters, 450.
Barnard v. Ashley, 18 How. 43.
West v. Cochran, 17 How. 403.
Gazzam v. Lessee of Philips, 20 How. 372.

In the case of Gazzam v. Lessee of Phillips, 20 How. 372, the court held that the surveyor general had the

power to make fractional subdivisions of fractional sections of public land containing more than eighty acres; in fact, that he had discretion as to the form of division of public lands, and the description of those divisions; the court in that case overruling the case of Brown v. Clements, 44 U. S. (3 Howard) 650.

In fact it is the settled law of the United States courts that the descriptions as made of the survey by the surveyor general are controlling; and when the patent is of lands of a governmental description, "according to government survey," and is of a fractional portion of land fronting upon an inland lake or water "according to government survey," these are the controlling words and limit the amount of land covered to the acreage of the fractional description determined and entered by the surveyors in their minutes and upon their maps. So that in the case of the patent by the United States to Burnell, which describes the lands conveyed as "the east half of 10 and the west half of 11, according to government survey," it conveyed only the acreage as specifically stated by the surveyor general, as the acreage of each fractional lot within the limits of what would be the "east half of section 10 and the west half of section 11," if the south lines were extended through the lake, and the amount of territory conveyed was the total of those fractional lots, namely 555.15, which it will be noticed is the specific amount of acreage stated in the patent to Burnell. Thus making it plain that while the patent also speaks of the land conveyed as "the east half of 10 and the west half of 11," which, if there had been no portion of this inland lake within its limits, would have been 640 acres, it in fact limited the actual amount for which payment was to be made, and for which title was given by metes and bounds to the upland, viz: The government

fractional lots fronting upon this Lake Angeline within sections 10 and 11. Thus Burnell, and through him the defendant, The Cleveland Iron Mining Company, acquired title to all of those "fractional" subdivisions or lots of sections 10 and 11 fronting upon the inland lake, and by virtue of such frontage, under the law as above pointed out, acquired ownership to that portion of the lake abutting their ownerships of these subdivisions to the center of the lake only, and to the point where the complainant alleges its title to extend, by virtue of its ownership to the center of the lake from the south side of the lake.

It will thus be seen that there is no force whatever in the allegation of the Cleveland Iron Mining Company, and in the arguments made by its counsel in the court below, when they assert that by the words of the patent to Burnell they received absolute title to 640 acres, instead of 555.15, and that their title extended to the south line of sections 10 and 11, if extended east and west through the waters of this inland lake, and that it took in all of the lake to that line, if so projected.

In the case of Willson v. Hoffman, 70 Mich. 557, that court used the following language: "In granting patents for lands it is usual for the government to add immediately after the statement of the number of acres which the tract contains, if fractional, these words, 'according to the official plat of the survey of said lands returned to the general land office by the surveyor general.' Such language when used constitutes a part of the description of the premises conveyed and limits the purchaser to the tract as marked upon the plat of the surveyor general.

This was so held in Gazzam v. Lessee of Philips, 20 Howard, 372, which overruled Brown's Lessee v. Clem-

ents, in 3rd Howard 650. This was the language used in the patent to Tingley.

Thus the description in the patent to Burnell, that it was 555.15 acres, "according to government survey," fixed the limitation and description of the lands conveyed, namely, to the fractional lots abutting upon the inland lake in question.

Upon the hearing of this case the plat book of the United States government, kept in its local land office at Marquette, was offered in evidence, containing two maps, one showing the township in question and the inland lake, with the fractional lots surrounding it, and the acreage in each lot marked thereon. This map is Exhibit "C", page 34 of Record; the other showing the same township from the records of the local Marquette United States land office offered in evidence as Exhibit "E" of Record, page 36, showing the same inland lake and the lots surrounding it, with the acreage marked thereon; also showing on the margin the meander courses and distances of the survey of the lake made by the surveyor general. This was also offered in evidence, together with the meandered courses and distances made of the survey of the surveyor general, certified by the commissioner of the general land office. These courses and distances so certified are the same as appear on the margin of map Exhibit "E." This certified copy of courses and distances appears upon pages 34 to 36 of the Record. These maps, with the notes of the survey, taken together from the original record of the Marquette United States land office, constitute complete evidence of what the surveys were, and of the acreage contained in those government subdivisions.

Wilson v. Hoffman, 54 Mich. 247.

This showing by the maps was not necessary, as the

acreage stated in the patent to Burnell, as we have pointed out above, was 555.15 acres, but for abundant proof we offered it.

Section 464 of the U. S. Statutes at Large provides: That the field book of the surveyor general shall be returned by the surveyor general, who shall thereafter cause a description of the whole lands surveyed to be made out and transmitted to officers who may have to superintend the sales, which is recorded and to be in the possession of the parties who make the sales, and presumptively for use in making such sales. Does not the statement in the conveyance, made from such information so preserved as directed by the statute, furnish the descriptive quantity of the thing conveyed, as 555.15 acres, and does it not refer the purchaser to the maps and notes of the survey, which show the lands to be fractional subdivisions, containing that amount of acreage abutting upon the margin of an inland lake, when in the patent it is stated that the conveyance of the land is "according to government survey."

It seems to us there is no room for doubting that when the general description of the government subdivision known to contain forty acres, unless fractional is stated to contain much less than the forty acres, it shows that it is fractional, and that it is so purchased and so conveyed by the patent, as such from the description in the "field book" of the surveyor general, which field notes are required by the act of congress to be preserved and furnished to the local United States land office, whose duty it is to sell and convey.

Revised Statutes of the U. S., sections 2395, 2396, 2397.

In the case of Mann et al v. Pearson, 2 Johnson's

Reports (N. Y.) 371, it is stated that there was a sale of a definite description of land as *lot numbered 78* in the township of Lysander, *containing 680 acres.* It turned out that it *contained only 424 acres and one-eighth.* Suit was brought for *damages* upon the bond given for the sale, because the lot did not contain 680 acres. This lot 78 was a *subdivision according to the laws of the state of New York.* Judge Spencer in delivering the opinion of the court said, "I understand the prem-"ises were sold, as fully and definitely described as if "metes and bounds had been used in ascertaining the "thing granted, and so must the parties have under-"stood it. Also all of the lands in the counties of "Cayuga, Onondago and Senaca have been surveyed "into lots by the surveyor, which, under the public "acts, and pursuant to the directions of these acts, "maps have been returned to the office of the secretary "of state, on which patents have been issued. *It can-"not be* pretended therefore, that, when the parties "contracted about a lot defined by number, town and "county, that they did *act with reference to the maps* "describing and designating this lot in the secretary's "office. It necessarily followed that the subject mat-"ter of the apportionment was precisely ascertained."

This New York court thus holding, that the party purchasing was referred back to the record as made by the surveyor general and kept by the government for a statement of the acreage conveyed in lot 78, which, we insist, would be the case as to the United States patent made to Burnell in the case we are considering.

So that not only by the patent itself is the acreage stated to be 555.15, but, the records and maps made by the surveyor general show the same thing, and are offered in evidence and makes it conclusive that there was conveyed to Burnell *only 555.15 acres*, the up-

lands, *by metes and bounds*; and that any title acquired by him, or his grantee, The Cleveland Iron Mining Co., was by virtue of the law which gave it *title* to portion of the inland lake to its "*center*," and to all the abutting owners in proportion to their shore frontage, and not by virtue of a description of "east half of 10 and west half of 11" in the patent itself.

Washburn on Real Property, Vol. 3, page 402, states the rule as follows: "Sometimes the quantity of land "conveyed is mentioned in the deed, but independent "of an express averment or covenant as to quantity, "this is always regarded as part of the description "merely, and will be rejected if it be inconsistent with "the *actual area* of the premises, if the same is indi- "cated and ascertained by known monuments and "boundaries. It aids, but ordinarily does not control "the description of the granted premises."

In the case of Park v. Kane, 22 How. 11, the court held that "A description as a lot necessarily refers to "the official surveys in the general land office, to which "the court looked for the final determination of the "matter."

V.

Has Complainant Parted With Its Title North of the South Line of Section 10? If So, How?

It appears from the testimony of Mr. Kidder that he was the agent for the complainant in charge of its local business and financial affairs at its mine on Lake Superior. That he had nothing to do whatever with the

sale or disposing of its real estate. That the company has been carrying on mining operations there since 1864 on the north half of the north half of section 15, being lots 2, 3, 4 and 5 of that section. That it commenced mining operations in the fall of 1863. That they began mining operations for iron ore on these lands by surface work on the side of the hill, which was close to the lake. That as they mined into the side of the hill the waste rock was carried and dumped into Lake Angeline, filling up the lake for quite a distance, maintaining the shore level as the fill was carried out into the lake. That by 1895 the lake was filled up some distance out, and for an area of about five acres north of the south line of section 10. That complainant erected buildings on the territory north of the south line of section 10, consisting of carpenter shop, erected in 1884, partly on this made ground north of the south line of section 10 and partly across the section line, on filled ground south of the south line of section 10. The carpenter shop cost about $1,800 to $2,000, and was a frame building covered with corrugated iron, size something like 30x60; it was a well constructed building, designed for housing tools. Complainant also constructed a blacksmith shop on section 10 of this made land. This was a frame building, bricked between the studding, covered with corrugated iron on the sides and roof, and also cost about $2,000. Complainant also constructed other buildings on this made territory north of this south line of section 10. It also moved a supply house over onto this made ground in 1885, which was about 20x24 feet. It also placed a pump house and engine house on the land over the line in 1887; also a powder house and an ice house. (See pp. 84 to 86 of Rec.)

Mr. Kidder stated that he learned from Mr. Mann

of Milwaukee in 1887, that there had been a decision by the supreme court of Michigan, allowing parties owning any part of a government subdivision fronting on an inland lake to fill out the lots from the inland lake, to the full size of government subdivisions; and from looking at the map he saw that if it was true it would give the territory north of the south line of section 10 to The Lake Superior Iron Company. That he went to Mr. Clark, an attorney, for an opinion in the matter. Mr. Mann had told him that the supreme court decision would be found in the North Western Reporter. It was the decision in the case of Clute v. Fisher, 65 Mich., page 48. That the information which he received from Mr. Mann and the opinion from Mr. Clark caused him to move some of the shops over the section line onto section 15, because he considered the buildings too valuable to leave in a position where the ownership might be jeopardized. That he moved over only the machine and carpenter shops. The other buildings he left there; that is, the powder house, blacksmith shop, the cheaper one, and the other buildings that he mentioned. That the complainant has been in occupation of filled ground north of the south line of section 10 ever since, with those buildings which remain there now. That after he learned of the decision of Clute v. Fisher, he understood that it restricted complainant's ownership to the north line of section 15 in the bed of Lake Angeline (see pp. 86 to 88 of Record).

Mr. Kidder stated that after he learned of the decision in Clute v. Fisher, and from that time to the decision of the case of Ice and Coal Co. v. Ice and Coal Co., 102 Mich., decided by the supreme court of Michigan in 1896; his understanding was, that the case of Clute v. Fisher restricted complainant's ownership to

the north line of section 15 in the bed of Lake Angeline. That he heard February 8th, 1896, that by the decision of Ice and Coal Co. v. Ice and Coal Co., 102 Mich., the case of Clute v. Fisher had been overruled (see p. 87 of Record). That he received such information from Mr. Clark at that time (see pp. 87 and 88 of the Record).

It thus appears that from 1863 until 1887 the complainant was operating its mine dumping its waste into Lake Angeline, taken from the ore body in the open "pits" as mined, until it had not only filled up a portion of the lake south of the south line of section 10 projected through the lake amounting to 5.27 acres (see map Ex. F, p. 40 of Record), but also about five acres north of this south line of section 10. That it had erected valuable buildings, consisting of machine shop, blacksmith shop and other buildings on this filled ground now in dispute, costing about $5,000, which it had occupied for many years in connection with its mining. That the complainant claimed to own this territory to the center of the lake, and had occupied it under such ownership for those many years.

Mr. Kidder further testified, on cross-examination, that the the carpenter shop and the other buildings were built north of the section line because of the understanding that their property extended north of the line by means of their riparian rights. That the water of the lake extended south of the line, and that they had filled it up with waste from the mine. That he understood that their title extended north of the line because of the riparian ownership from the shore. That this understanding remained so until he was informed of the decision of the supreme court in Clute v. Fisher, 65 Mich. 48. That he asked Mr. Clark his opinion about it, when he advised him in substance

that *under that decision* their ownership would be limited by the north line of section 15. That he then as a matter of precaution moved the more valuable buildings south of that line in order to save them in case this opinion proved to be correct. That he accepted this opinion so far as *to govern his actions.* That he understood it to be only a matter of opinion, but did understand that the opinion of the supreme court was controlling. That he was aware that courts sometimes change their opinions and that he had frequently thought that with reference to this very thing—that the supreme court might change sometime. That afterwards Mr. Clark informed him that the supreme court had changed its opinion and cited authorities which he thought were sufficient to show that. That he considered it a report on the action of the supreme court. That he didn't consider it was Mr. Clark's individual opinion. That it was a statement of the action of the supreme court which he gave him, and which he could read for himself, and could form an opinion on the condition of the law when he read the extracts from the supreme court decision in the case (see pp. 101 and 102 of Record).

The witness further stated, that the date when he was first informed of this decision in the "Ice & Coal Co. case," over-ruling Clute v. Fisher, was February 8th, 1896, and that there was notice given to the defendants October 29th of complainant's rights north of the said line; given by his direction. (See pp. 99 inclusive of the Record.)

Mr. Kidder further testified: I heard the last of December, 1895, that the supreme court had changed its views expressed in the Clute-Fisher case, and then went to Mr. Clark, who took some time to write his opinion, which he gave me February 8th, 1896. When

the pumping contract was made (which was dated the 17th of March, 1892), I understood our premises stopped with the south section line of 10. (See pp. 87, 102 of Record).

He further testified:

Q. Instead of making your contract (pumping contract) with a view of that ledge of rock (diorite), you made it with a view of the section line, as the division between your properties? A. *O, no. We didn't consider it as a division between the properties at all;* that was simply a circumstance which affected the water question. The fact that the diorite division rock kept the water in on the south side kept it there.

Q. In making the contract what you intended to provide for was the protection of your property south of the section line? A. Protection?

Q. Yes; and accommodation of your workings in your property which lay south of the section line? A. Protection for what—I don't understand?

Q. Protection from water? You wanted to get rid of the water that interfered with your workings south of the section line? A. We couldn't get rid of any water unless we took it away ourselves. The very point was that diorite would prevent the water from draining out of our fold, into that north fold.

Q. Was not in negotiating the contract the end which you sought, to care for your property south of the section line; was it not? A. Why, it was to prevent our paying for the pumping of water which would not do us any good.

Q. To express it in another way, you didn't at that time understand that you were interested in any property which might be found to exist north of that section line? A. No, we didn't at that time understand that we were interested in anything north of that line.

Q. *And you contracted with reference to that fact?* A. *Yes—well that fact didn't govern it; that fact wasn't thought of at that time—cut no figure.*

Q. *What wasn't thought of?* A. *The fact that we didn't own anything north of that section line. It had nothing to do with it.*

Q. If your mining rights extended as you now claim them north of the north line of section 15, you would be interested in keeping the body of the lake pumped out would you not? A. No sir.

Q. Now, now? A. No sir. The thing is just as true to-day as it ever was. My position would be just the same certainly.

Q. You mean the main body of the lake? A. Yes, the main body where the pumping station is; where the permanent drainage is affected.

Q. North of diorite? A. North of the diorite. *It is just as true to-day as it ever was.*

Q. If your premises extend to the entire territory within that dotted line (showing complainant's claim of territory north of the south line of section 10) would you not be interested in the water which would be gathered here in the center of the lake? A. There is where that diorite comes down, right through there (indicating). So far as we know and have every reason to believe, that diorite lies like that—forms one corrugation. (See pp. 103 and 104 inclusive of the Record).

Q. You drew the contract with reference to the south line of section 10 in reference to your property rights, did you not? A. Yes.

Q. Then you were dealing with that as your boundary, were you not? A. Yes, under that same impression in Clute v. Fisher (referring to pumping contract of March 17th, 1892.) (See page 105 of the Record).

Mr. Kidder further testified on cross-examination:

Q. You remember in 1880 or 1881 having a conversation with Mr. Morse and with Mr. Bacon, then captain of the Cleveland mine, in regard to the south line of section 10 being the boundary between your two properties? A. I remember Mr. Morse's coming to me and asking me—

Q. Wasn't Mr. Bacon with him? A. I don't remember. I remember Mr. Morse coming to me and asking me to sign a paper of some kind—a letter of recommendation to our people, that they should sign a *quit-claim deed* of *everything north of the south line of 10*, and stating at the same time that the Lake Superior Iron Co. and the Cleveland were to exchange deeds of that sort, and that they would also deed to the Lake Angeline everything south of the south line of 10.

Q. I am not talking about 15; I am asking you about the conversation you had with Mr. Bacon and Mr. Morse in 1880 or 1881; do you remember any such? A. No, I don't.

Q. In which you referred to the south line of section 10 as the boundary line? A. I don't at all remember anything of that kind.

Q. You remember Mr. Bacon and Mr. Morse coming over there and your mentioning that there was a center post there right at the end of lot 6, so-called, dividing lot 6 into two parts—a quarter post—and stating to Mr. Morse and Mr. Bacon that the Cleveland Iron Mining Co. owned a little portion of that lot lying to the east of that quarter post, and also stating that the section line, the south line of the section, was the boundary between the properties of the Cleveland Iron Mining Co. and the Lake Superior and the Lake Angeline? A. I have no recollection of any such thing at all.

Q. *Do you say positively that no such conversation*

occurred? A. *I should say so most certainly. I have not the slightest recollection and I think I should have, because that is not the position I took at that time.*

Q. Do you remember any conversation you had with Mr. Morse and Mr. Bacon on that subject? A. I only remember that application Mr. Morse made to me, and *I remember my answer very distinctly* when he asked me to recommend to our company that they sign a quit-claim deed of everything north of the line.

Q. You didn't want to do it? A. *I told him I wouldn't think of doing such a thing.*

Q. When was that? A. I couldn't tell you; *I should say it was about 15 or 16 years ago.*

Q. Was it prior to the year 1880, at the time Mr. Morse was agent? A. Mr. Morse was agent of the Cleveland Iron Mining Co.

Q. Was anybody present at the interview? A. I don't remember that there was at all. I know what my mental attitude was at that time on the subject. *I know I thought decidedly that we owned to the center of the lake. I always thought so until this matter of Clute v. Fisher came up.*

Q. Did you make any claim of that kind? A. *I told Mr. Morse so.* We had no object—*we occupied the territory with buildings. We dumped over there and used it right along as if it were ours.*

Q. You didn't occupy any territory west of the center line of section 10? A. No; *we had no occasion to.*

Q. You say you found out in regard to this decision of Clute v. Fisher in the fall of 1895. You located it, I think, sometime in December. A. Yes; you mean the other one?

Q. I mean the Ice Co. case against Ice Co. A. Yes, sir.

Q. You put it Dec. 30th. A. Yes, sir; about that.

(See pp. 108, 109, 110 of Rec.)

It thus appears from the testimony of Mr. Kidder, *that from 1864 to 1887 the complainant was in open and notorious possession of the property now in dispute, north of the south line of section 10.* That they had made a large acreage of ground, by filling in the debris from their mines located on the margin of the lake, and had erected valuable buildings on this territory; and that Mr. Kidder was asserting the ownership of the complainant to the "*center*" of the lake, and denied all rights of the defendant, The Cleveland Iron Mining Co., when Mr. Morse, agent, asked him to recommend complainant to quit-claim all its title and rights under the lake to the south line of section 10. Mr. Kidder then asserted to Mr. Morse, *that they owned the territory to the center of the lake, and that this had always been his claim and was up to the time* of learning of the decision of the supreme court of Michigan in Clute v. Fisher, 65 Mich. 48; and that he then thought, notwithstanding that opinion, that the supreme court might change that opinion; but that on account of that opinion he supposed that so long as it was maintained it would be the controlling law of the state, and that complainant was bound by it.

It also appears by Mr. Kidder's testimony that at the time Mr. Morse came to him, the complainant had not filled in any territory *east* of the north and south center line of 10—the territory claimed by the Cleveland Iron Mining Company—and had not erected buildings thereon, but only upon the territory lying west of the north and south center line of 10—the territory now claimed by the defendent, The Lake Superior Iron Company, which is the territory where complainant filled five acres north of section line and erected the buildings mentioned. It appears that this filling was done there because the complainant, when mak-

ing the filling in the lake, was mining *only* in open pits and in shafts just to the south of the west half of section 10 at the points indicated on complainant's Exhibit "F," where appears the drawing of mining pits, marked "open pit," in the ore formation marked "outline of ore body." But we insist that the occupation of this riparian ownership west of the north and south center line of section 10, if projected, was the occupation of the entire riparian right, as it was an ownership in an entirety, and not controlled by any section lines, for no such lines existed in the waters of the lake. They are simply referred to as descriptive, by complainant's and defendant's counsel, the same as if projected through the lake. The section lines ended at the meander line of the lake from either way.

It further appears from Mr. Kidder's testimony that to avoid the danger of losing the more valuable buildings, built upon the new made ground north of the south line of section 10, he caused them to be moved just over "the line" to the south, as they now appear on complainant's map, Exhibit F, marked "machine shop" and "carpenter shop". This he did as a matter of caution. There is no evidence that the board of directors of the company at Pittsburg, Pa., or the stockholders, knew anything about it at the time it was done. Mr. Kidder was in charge of the local mining operations and finances of the company at the mine, and whatever he did was according to his own judgment; and according to that judgmont, he not only moved the machine shop and carpenter shop south of the south line of section 10, but avoided doing anything that would conflict with the law as laid down by the supreme court of Michigan in Clute v. Fisher, 65 Mich.

Now, what was the determination in Clute v. Fisher, 65 Mich. 48, as to riparian rights?

The court held that the owner of a "fractional" subdivision of land, made so by an inland lake, *owns the soil under the water of said lake*, which would be included within a United States subdivision if its lines were extended into the lake, so as *to square out the fractional description*, and that such owner can maintain trespass against anyone who cuts and removes ice formed in the lake over such soil without his consent. The court in that case, discussing the matter, held as follows:

"It therefore becomes apparent that the true and "*only* rule to give effect and harmony to these decisions, "and *place the ownership of the bed of this lake in some* "*person or persons*, so that the extent and boundary "lines of *such ownership* may be easily *ascertained*, is to "*invest the holder of the title* to any fractional subdi- "vision of a section bordering upon this lake *with the* "*ownership of the bed of the lake to the lines of said sub-* "*division as they would be if continued through or into* "*the lake.*"

Applying this rule to the waters of Lake Angeline, and to the territory now in dispute, it will be seen that *squaring out* either lots 5 or 6 of section 10 would include the territory of the lake lying *west* of the north and south center line of section 10, and north of the south line of section 10, which would be to determine that the Lake Superior Iron Company owned the territory under the lake which it now claims, and in dispute in this case; and applying the same rule to the territory in the *east* part of section 10, squaring out lot 7 owned by the defendant the Cleveland Iron Mining Company, it would give to that company all of the territory east of the north and south center line of 10 now in dispute.

If the complainant had continued to assert ownership and possession in conflict with this plainly stated rule of ownership in Clute v. Fisher, 65 Mich., it would have been liable for trespass under the law, as stated in that case; because, in the language of Justice Field in Baltimore & Ohio R. R. Co. v. Bogue, 149 U. S. 370, "*The decision of the highest court in the state makes the* "*law which the citizen is compelled to follow until over-*"*ruled.*" The eminent justice in that case further held that: "The law of the state on many subjects *is found* "*only in the decisions* of the courts, and is equally oper-"ative as if *embodied in a statute.*"

"The law is to be discovered from the decisions of "the court as well as from statutory enactment. This "is a legal principle, old and firmly established, and is not subject to controversy.

Baltimore & Ohio R'y. Co. v. Bogue, 149 U. S. 370, 397.
Beecher v. Cheshire R'y. Co., 125 U. S. 555.
Detroit v. Osborn, 135 U. S. 492, 497.
Burgis v. Seligman, 107 U. S. 359.
Burgis v. Seligman, 107 U. S. Lawyers Co. Op. Ed. Book 27, p. 365 and cases there cited.

Under these circumstances, what could Mr. Kidder do as agent of this property but submit to the holding of the supreme court until there should be a *change* of the law? He, acting as a law abiding citizen, did not by *consent* give away legal rights of his principal. To claim that he did would be absurd.

It appears that the questions decided in Clute v. Fisher, 65 Mich. 48, came before the supreme court of Michigan in the case of Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 228, for re-consideration. Ex-Justice Champlin, who was one of the justices of the supreme court of Michigan when Clute v. Fisher was decided, and who concurred in the opinion in that case, was the

attorney in Ice and Coal Co. v. Ice and Coal Co., attacking the accuracy of the decision in Clute v. Fisher, in which he had participated; and it is quite interesting to review his argument appearing in his printed brief on file in that court. On page 6, he says:

"It will be noticed that at the time Clute v. Fisher "was decided, I was a member of the court and con- "curred in the opinion filed. It is therefore with the "greatest diffidence that I am compelled to assert, that "the *reasons* given as the *basis* for the conclusions "reached were *based upon errors of my own.* A cele- "brated jurist has said, that following a decision which "upon a more careful consideration does not comport "with settled legal principles, or does not secure to the "individual acting under the restraint of a civilized "community or social compact, their just legal rights, "and thus applying *successively a wrong rule, is little "less than imparting immortality to error.* I take my "full share of the blame in putting the court in a wrong "position by the case of Willson v. Hoffman, 54 Mich. "246; and freely admit, that I followed the decision in "Brown's Lessees v. Clements, 3 Howard 665; and that "I was unaware that it had been expressly *overruled* "in Gazzam v. Lessee of Philips, 20 Howard 372. The "court followed Willson v. Hoffman, 54 Mich. 246, in "Kazer v. Sunderland, 59 Mich. 455, and in Palmer v. "Dodd, 64 Mich. 474."

Under the able review by Ex-Justice Champlain of Clute v Fisher, its doctrine was overruled by the Michigan supreme court; and Chief Justice McGrath, in delivering the opinion in Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 227, in overruling Clute v. Fisher, used the following language: "A correct result "was reached in the Clute case; but the *reasons given "are without support.* That case and those upon which

"it relied were based upon Brown's Lessee v. Clements, "3 Howard 665, which was expressly overruled in "Gazzam v. Lessee of Philips, 20 Howard 372." The court overruling the doctrine as established by Clute v. Fisher, and establishing the law of riparian ownership as defined in Gazzam v. Lessee of Philips, 20 Howard 372, and in Hardin v. Jordan, 140 U. S. 371, and as we now claim it.

See Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 235, 236.

It will be noticed that Justice McGrath held, that in the Clute case "*a correct result was reached*". By examining that case it will be seen, that on account of the *small extent* of territory in the inland lake, the erroneous rule resulted in an equitable *result;* a result not in conflict with the rule as now established.

It cannot be claimed that there was any *laches* or *consent* or *waiver* of rights on the part of the complainant, because a local agent at the mines followed the plain holding of the supreme court of Michigan until that holding was overruled, under the powerful argument of Justice Champlin, one of the judges who participated in the erroneous holding, who, confessing his part in the error, appealed to the court not to "*impart immortality to error*".

Now, is it possible, that it can be said in this case, under these circumstances, that a mining corporation having its stockholders scattered over the country; with its chief business office in Pittsburg, Pa., has lost real estate title after it had been in occupation and made large improvements upon it, spending over $5,000 in buildings, beside making about five acres of territory in the lake, because its local agent at the mine, Mr. Kidder, did not *resist* the law established by the decision of its highest court; and because he

moved *some* of the most valuable buildings over the line to avoid danger of losing them; the company still remaining in possession of the balance of the buildings on the disputed territory, which he had erected there. And is it possible, that this title has been lost to the complainant because Mr. Kidder, the local agent, did nothing to prevent defendants from asserting title to, or using the disputed property until after the supreme court of Michigan held its former decision in Clute vs. Fisher *erroneous*. It appears that within a reasonable time after learning of such decision, on the 29th day of October, 1896, Mr. Kidder served notice upon the defendants, that they were trespassing upon the rights of the complainant. (See page 99 of record.)

It was held by this court, in the language of Justice Field, that "The law of the state on many subjects is "found only in the decisions of the court, and is "equally operative as if embodied in a statute * * * "The decision of the highest court in the state makes the law which the citizen is compelled to follow until overruled." Baltimore & Ohio R. R. vs. Bogue, 149, U. S. 370, 397.

We submit that the complainant should forfeit no rights, by submitting to the law as established by the decision of the court, pending the overruling of such decision, and the change of the law by such action.

It appears that after the decision in Clute vs. Fisher, 65 Mich., and before overruled, the complainant and the defendants entered into a pumping contract, dated March 17, 1892, to pump out the water in this inland lake, to facilitate mining operations under the lake. That in fixing the amount that each should pay for pumping; the relative amount of territory supposed to be held by each at that time was considered, as well as other conditions, in arriving at the amount that each

should pay for pumping. The contract appears upon pages 88 to 95 of the Record.

From Mr. Kidder's testimony it appears, that he personally carried on the negotiations with Mr. Mills, the local agent of The Cleveland Iron Mining Co., and with Mr. Mather, who is the president of that company, in making the pumping contract. (See p. 88 of Record.)

It also appears from Mr. Kidder's testimony quoted above that when this pumping contract was made they acted upon the idea that complainant's premises stopped with the south line of section 10, and he so supposed, after he heard of the case of Clute v. Fisher, in 1887. But in making the pumping contract it was not considered a division of territory between the parties. It was simply a circumstance which affected the water question. The diorite division rock in the lake kept the water in on the south side.

Mr. Kidder testified as follows: Q. To express it in another way, you didn't at that time understand that you were interested in any property which might be found to exist north of that section line? A. No, we didn't at that time understand that we were interested in anything north of that line.

Q. And you contracted with reference to that fact? A. Yes, *well, that fact didn't govern; that fact wasn't thought of at that time and cut no figure.*

Q. *That wasn't thought of?* A. *The fact that we didn't own anything north of that section line. It had nothing to do with it.*

(See pp. 103 and 104 of the Record.)

Mr. Kidder stated that sometime before the making of the pumping contract of March 17, 1892, iron ore had been discovered by complainant on the south side of the lake, extending under the lake; that he and Capt.

Walters, mining superintendent of complainant, were informed as to such discovery; and long prior to that time it was known that ore was under the lake. Don. Bacon, a witness for the defendant, The Cleveland Iron Mining Co., and a former agent of that company, testified that he discovered the iron ore extending under the lake on the north side of the lake in 1887, and that The Cleveland Iron Mining Co. had been mining under the lake through shafts and drifts on the north side since then. (See p. 185 of Rec.) And Mr. Kidder testified that the diorite rock was a dividing line between the folds of ore under the lake and extending through in an easterly and westerly direction, through the central portion of the lake. (See p. 185 of Rec.) Notwithstanding this knowledge by all the parties to this suit of the great value of this property, and this knowledge for *many years before the making of this pumping contract*, it is claimed by the defendants that the pumping contract was *intended* to be a voluntary apportionment of the lake between complainant and defendants. Or, in other words, that The Lake Angeline Iron Company gave to the defendants thirty acres of the most valuable mining territory in the iron district—valuable all around the lake. All the parties desired to pump out the water that mining might be done there.

Such a position is unreasonable. Mr. Kidder thought that on account of the decision of Clute v. Fisher, 65 Mich. 48, his company was deprived of its rights under the lake, and to its center territory his company had claimed and occupied for many years; in making the pumping contract the idea of division of property rights was never thought of. He did all the negotiating with Mr. Mills and Mr. Mather, acting for the defendants, in making the pumping contract. It is upon the theory

that complainant had no real estate title to the center of the lake, and that its rights were voluntarily transferred, that the defendant, The Lake Superior Iron Company builds its claim.

Chief Justice Grant in delivering the opinion of the lower court, states the *claims* of the Lake Superior Iron Company as follows:

"1. There has been a practical division of the lake "bed between the parties. That contracts, explorations "and mining operations have been carried on, on the "strength of such division, for many years.

"2. That the pumping contract executed by the sev- "eral parties under their corporate seal, and expressly "providing that it shall be binding upon the successors "and assigns of the several parties making it a contract "that amounts to a division of the lake bed by *deed* "duly executed by the several parties.

"3. That the pumping contract is entirely *based* upon "the division of the lake bed above mentioned, and "said division forms so essential a part of the contract, "that if such division can be set aside or disregarded, "the contract itself must fall. That in such case not "only is the agreement to continue the draining of the "lake at an end, but either party has a right to de- "mand, that the drainage of the lake must stop and "the water allowed to arise to its original level, a re- "sult which after all that has been done under the "pumping contract and reliance upon it would work "great injustice to the defendants.

"4. That if the original division of the lake is disre- "garded and a new division must be made, such divi- "sion must be made by the middle line or the thread "of the lake, in accordance with the common law rule "for division of the bed of fresh water streams."

It thus appears that the claim of the defendant, The

Lake Superior Iron Co., to this disputed territory is based upon a *denial* of the complainant's rights acquired under its *patent* from the United States, and a claimed acquiescence in such position by the pumping contract, and that the complainant acquired no title north of the south line of section 10, but that the defendant, The Lake Superior Iron Co., did acquire the same through *its patent* from the government, and that by the pumping contract the complainant *recognized such to be the case.*

The complainant claims ownership of the disputed territory to the *center* of the lake under its patent. That it is the owner of that real estate by virtue of its patent, and the riparian rights appurtenant thereto; that it had a real estate title to the center of the lake, which could not be disposed of except by the action of the stockholders of the company. This fundamental issue is presented as to the claims of both defendants, the complainant acquired title originally from the United States government by virtue of its patent to the center of the lake, and of the disputed territory. All other claims are collateral to that claim. The court below held that the complainant acquired no title in fee to any portion of this territory, and that therefore this pumping contract made by the agents of the company could dispose of whatever inchoate or other right complainant might have without the action of the stockholders, because it had no real estate title.

Thus, as to The Lake Superior Iron Co., as well as The Cleveland Iron Mining Co., the federal question is the fundamental one, underlying the entire inquiry.

The Lake Superior Iron Co. asserts but three claims:

First—That the complainant acquired no title in fee from the government to the land in dispute.

Second—As it did not acquire such title in fee from the government, any right which it had, if any, was surrended by the pumping contract without the action of the stockholders.

Third—That if this title was not disposed of then the division of the lake should be made by a different rule than that invoked by the complainant.

This last point was not considered or passed upon by the lower court.

It is thus plain that if this court shall find that the complainant did acquire title to the center of the lake, then it being beyond controversy that the conrt below held, that complainant had no such title, then, the decree of the lower court cannot be cannot be sustained, even if the pumping contract was intended by the parties making it, that it be a conveyance.

Estoppel.

The Cleveland Iron Mining Company insists that if required to surrender possession of this property, *which it never owned*, the legal title to which is now in the complainant, it will suffer irreparable injury, such as a court of equity should recognize and *estopp;* and in its pleadings and arguments counsel insists that it owns the *legal title* to the land in fee and always has *under its patent;* and also insists that if it is not the owner of the legal title, it is entitled to the benefit of *estoppel* on account of irreparable injury; or, in other words, that it shall be given title to this property, which it does not own, and never has, on account of the *mutual mistake* of ownership.

The court below in sustaining the rights of the defendants, as we have pointed out above, held that the complainant was *estopped* by the pumping contract from asserting its rights to the territory in dispute, if it had any such right; also held that the complainant *had no real interest in the land;* and did not define what, if any right, it had.

Chief Justice Grant, in delivering the opinion of the court below, referring to this phase of the contract, uses the following language: "Complainant, however, "invoked the doctrine that title to lands cannot rest "on *estoppel* on account of the *Statute of Frauds;* and "that a vote of *three-fifths of the entire stock* of the "company is essential under the statute to convey "title. The obvious reply to the *first proposition is,* "that defendants also established that the Statute of "Frauds does *not apply to boundary lines;* and that the "doctrine of estoppel will be applied to the voluntary "adjustment of disputed *boundaries.*"

Now, was not this holding in the language quoted in effect that a title could *not* be transferred by estoppel on account of the Statute of Frauds; and on account of the requirement of a three-fifths vote of the entire stock of the company to authorize such conveyance? The learned judge seems to suggest, that the determination as to who is the owner of this disputed *territory between the south line of section 10 and the center of the lake,* as claimed by the complainant, and which involves the *entire* question of ownership of this disputed territory, acquired under *patents* from the United States government, *is simply the settlement of a boundary line between adjacent owners;* and *therefore,* holds that neither the doctrine of estoppel, or the Statute of Michigan *forbidding alienation* of property of a corporation without a three-fifths vote of all the

stock interested applies. This is nothing more than an erroneous interpretation of the *federal* question involved in this case; and the *fundamental* one, upon which all the adjudication rests. The fact that the learned justice calls the *determination of ownership of the disputed territory* consisting of about 30 acres, of triangular form, *involved in this controversy*, simply the settlement of boundary lines, does not make it so. Neither does it take away from the inquiry in this court *the fundamental federal question, which one owns the territory between the south line of section 10 and the center of the section* under their patents from the United States; a question to be disposed of in this court.

So it appears that so far from the Michigan supreme court sustaining the theory of *title* by *estoppel* in the defendant the Cleveland Iron Mining Company, it has recognized the accuracy of our intention, that if such title is involved, *title* to real estate under the law of of Michigan *cannot* be built *upon estoppel* or in violation of the statute *against alienation without a three-fifths vote of the stock*. But, as we have said it does, hold that it is *not involved*. Thus, presenting to this court the inquiry, whether it is involved in considering the ownership of the disputed territory *between* the south line of section 10 and the center of the lake; and whether that does not involve the federal question, viz: which company has acquired *title by virtue of the patent* rather than one of settlement or simply a boundary line; whether it involves a question of title to property surrounded by metes and bounds, a territory *entirely* acquired by virtue of United States patent as a riparian right adjacent to that property. Certainly the court below could not have held, or intended to hold, that title to

lands could be acquired *by estoppel in pais*, when the statute of the state of Michigan is directly to the contrary, as well as many decisions of that court; and when in the case of Hayes v. Livingston, 34 Mich. 387, in the language of Justice Cooley, that court held as follows: "The Statute of Frauds is express, that *no interest* in "lands, with certain exceptions which are unimportant "here, shall be created or *transferred otherwise than by* "*deed;* and although it is perfectly true, as is shown by "Mr. Bigelow in his treatise on the law of estoppel, "page 606, that where one by his conduct is precluded "in law from asserting his title in property, there is "strictly no transmission of title, yet this is a *mere* "*technicality;* the legal consequences are precisely the "*same*, and for all practical purposes the estoppel works "a conveyance. *It would hardly be creditable to the ad-* "*ministration of the law, if the application of a statute* "*so important as the Statute of Frauds, should be turned* "*away and defeated by a technicality so shadowy and* "*unsubstatial.*"

And in the case of DeMill v. Moffat, 49 Mich. 126, 132, Justice Graves, who delivered the opinion of the court, held as follows: "Again the application of estop- "pel which is contemplated would virtually operate *to* "*transfer* a part at least of the interest from the defend- "ant to the plaintiff, by matter in pais, in *contraven-* "*tion* of the rule *now settled* in the state by Hayes v. "Livingstone, 34 Mich. 384; Nims v. Sherman, 43 Mich. "45. There was no error in *rejecting the estoppel.*"

And in the case of White v. Hapman et al v. 43 Mich. 267, 269, Justice Cooley used the following language: "One certainly cannot be estopped from asserting a "title against a party who has always known of it and "always recognized it. Moreover, as was shown in "Hayes v. Livingston, 34 Mich. 384, *the title to land*

"*cannot pass by estoppel*, but if the plaintiff claims not "the title but the right to *permanent* possession, *this* "*comes to the same result.*"

And in the case of First National Bank of Kalamazoo v. McAllister, 46 Mich., 398, 406, this court, in the language of Justice Campbell, held: "*Title to land* "*cannot pass by a mere estoppel shown by parol.* Neither "can *an apparent title be assailed by the parol evidence* "*of one who has caused its transfer.* The presumption "in favor of one who holds the earliest unrecorded "title cannot be destroyed without proof of an earlier "right based upon superior equities."

In the case of Shaw v. Chambers. 48 Mich. 355, the court held, in the language of Justice Cooley, that "*A* "*mere equitable estoppel is not needed to aid a legal* "*title.* Proof of equities becomes important when the "*legal title is defective*, or where it is proposed to as- "sail it. One who *claims the legal title to land* under "a will has no reason for resorting to equity to restrain "an action of ejectment against him, except when the "common law is inadequate to give full relief. In- "junction may sometimes be sought to restrain a suit "at law, where the latter only involves a portion of "the controversy, or is likely to leave an apparent "record title, clouding the legal title in issue."

And the Michigan supreme court, in the case of John Hancock Etc. Ins. Co. v. Dick, 114 Mich. 340, 341, in the language of Justice Hooker, held "That "the courts may grant more complete relief where an "instrument is fraudulently obtained, by compelling "cancellation or surrender, and by rendering equitable "relief. As counsel suggests, there are cases which " to some extent at least, may seem to militate against "this theory, but they do not appear to have been so "considered by the court. Bay City Bridge Co. v.

"VanNetta, 36 Mich. 210; Shaw v. Chambers, 48 Mich. "358; Teff v. Stewart, 34 Mich. 1. Shaw v. Chambers "was an ejectment case, and the *only ground* of equit- "able jurisdiction was an alleged *estoppel in pais.* This "was disposed of on the *well settled rule in Michigan,* "*that titles to land cannot rest on estoppel in pais,* and "nothing remained but a legal defense."

So it is clear, that the supreme court of Michigan could have had no intention to sustain the theory of the answers, that title could be conveyed by estoppel in pais or that there could be a *perpetual restraint* from asserting title, which is the same thing. The holding was, as we have said, simply that the controversy was a case of *settlement of boundary lines.* But it is, in fact, the determination of the title between the complainant and the defendants of about thirty acres, and not simply the settlement of a boundary line; and the holding of Justice Grant *upon that point, was an erroneous disposition of the federal question involved.* Calling it whatever we see fit; it is *still* the *federal* question, which is the *fundamental issue* in this case—"*who owned this land?*" the complainant or the defendants, under their several titles acquired under the patents from the U. S. government?

VI.

What are the Equities of the Parties to this Suit?

1. The complainant, beyond any question, acquired the legal title to the property in dispute through the patent from the general government.

2. It held possession of the property, operated an iron mine close to the shore of this inland lake, contiguous to the property in question, developing the mineral value on the whole south shore. It commenced its mining operations and development in 1863. It erected blacksmith shop, carpenter shop and other buildings upon the territory in dispute, which were used in connection with the operation of its mines adjacent, as stated above, and, as appears upon the map, complainant's Exhibit "F". It asserted and maintained this ownership openly and notoriously, by this possession and development of the mine adjacent; determining its wealth by large expenditures of money.

3. The Cleveland Iron Mining Co., through Mr. Morse, the agent of that company, about 1885, asserted ownership to the south line of section 10 east of the north and south center line of 10, projected through the lake, because of the *description* in the Burnell *patent*, under which it claimed and asserted this, because that patent, as a part of its description, conveyed the *east half of section 10, and the west half of section 11*, though limiting the acreage to 555.15 acres, the acreage of the upland. This claim, we have shown, has no force whatever, but it was the assertion of an adverse right, by the Cleveland Iron Mining Co., and vigorously resisted by the complainant, through Mr. Kidder, as we have shown from his evidence, which is not contradicted; when he refused to advise his company to quit-claim that interest to the Cleveland Iron Mining Company, as requested by Mr. Morse, and vigorously asserted ownership of complainant under its patent. (See pp. 108 and 109 of Record.)

So this adverse claim has no force as a defense.

4. The Lake Superior Iron Co. has never occupied any portion of this disputed territory until within the last

few years, it has placed a diamond drill upon the property and done some diamond drilling searching for ore. The evidence shows just what those diamond drill holes cost, and the refunding of what they cost, with interest, would cover its actual loss when added to the extra amount of pumping expense paid by it under the erroneous apportionments of the amount of expense to be paid by each one of the companies for pumping out the lake. These extra expenses are easily arrived at from the evidence in the case, and from the accounts kept by Mr. Hall, and the accountant of The Cleveland Iron Mining Co. Mr. Hall was the general manager of The Lake Superior Iron Co. (See pp. 108, 109, 110 of Rec.)

The complainant offered in the court below, and offers in this court, as a condition of the decree in its favor, establishing the title in it to the territory in dispute claimed by the defendant, The Lake Superior Iron Co., to repay to it the diamond drill expense shown to have been expended by the Lake Superior Iron Company upon the property which it now claims adversely, together with the interest thereon; and also for the amount of all expense under pumping contract which it paid above its just proportion in the pumping referred to.

This would dispose of every possible equity that the Lake Superior Iron Co. can claim, if the title to the territory in dispute is legally in the complainant.

5. It conclusively appears here that on account of the erroneous decision of the supreme court of Michigan in Clute v. Fisher, that complainant was deprived of its property until that erroneous decision was overruled, at least Mr. Kidder was warranted in so considing it, and it was the cause of his acquiescing in the claims of defendants to the property in dispute, or

rather not resisting them. This acquiescence then, that is on the part of the local agent (there is no evidence of acquiescence by the stockholders or knowledge of the matter), was simply ceasing to assert title beyond its actual occupation. That the holding in Clute v. Fisher was erroneous is now beyond question, because overruled by the supreme court of Michigan. That this erroneous holding prevented the complainant from the lawful occupation and use of its property is also beyond question. That the decision of the highest tribunal of a state establishes the law as does a statute, is also clear from the decisions of this court quoted above.

Can complainant be held to have forfeited its title by failing to assert adverse rights, and failing to oppose occupation by either of the defendants prior to the overruling of Clute v. Fisher?

To say that complainant, or its officers, could have done different and be law-abiding citizens would be unjust; and to say that complainant forfeited any real estate title by the course taken by its local agent would be without precedent.

6. It is true that The Cleveland Iron Mining Co. has spent a large sum of money in driving drifts from its mine on the north side of the lake through the diorite division between the north fold and the south fold of ore under this lake into this disputed territory, and that it has mined a large amount of ore. It has done this, we believe, under the honest belief that it owned the property, and has done it without resistance on the part of the complainant since the decision of Clute v. Fisher, until the overruling of that decision by the Michigan supreme court.

Now, if irreparable injury would be the result in requiring the defendant, The Cleveland Iron Mining Co.,

to surrender possession of this property, injury that can not be redressed, there would then be an equity in favor of The Cleveland Iron Mining Co. But the evidence shows, and beyond contradiction, at the time the time the proofs were taken in this case, two years ago, that The Cleveland Iron Mining Co. had cleared a profit over $100,000, over and above all expenditures for drifts, mining work, machinery and the extra share of the pumping expenses on this land. A statement of this expense we will give below.

This appearing to be so, where is the irreparable injury? It is simply a matter of dollars and cents. If The Cleveland Iron Mining Co. has taken ore from the land of the complainant which it did not own, though honestly, and with the idea that it did own it, this gives it no equity in the land itself. The title would be as it was before. The damage would be to the party owning the land, the complainant, in having its valuable iron deposits depleted, and if, as we have said, The Cleveland Iron Mining Co. received and is allowed to retain the profits which it has made from the mining on this land before notice to it that Clute v. Fisher had been overruled, it will be paid for all its expenditures and a liberal profit besides, and it will not be the sufferer by a decree against it, as prayed for, because it is simply required to surrender possession of a property which it never owned, and is permitted to retain profits which it had made mining from the property of another.

7. We insist that since the notice by Mr. Kidder, in 1896, served upon The Cleveland Iron Mining Company, that it had no right to the land; it would be equitable for The Cleveland Iron Mining Company to account for all the ore that it has removed since that time, receiving an allowance for actual expenditures in the mining of the same.

Chief Justice Grant, in the court below, in delivering the opinion of the court, in stating what he understood to be the claims of The Cleveland Iron Mining Co., used the following language:

"The claim of The Cleveland Iron Mining Company "is thus stated:

"*First*—The patent under which the defendant, The "Cleveland Iron Mining Company, claims title, gave it "title to the whole east half of section 10 to the south "line thereof, and complainant is barred from objecting "to this claim because it was treated as a body of water "covering a portion of that territory as of *no value and "joined in the draining of the water as if the land were "merely swamp ground—valuable only when reclaimed "and made dry land.*"

(See....N. W. Rep., page 400. Record, p. 225.)

The complainant was operating an iron ore mine, and had been from 1863 to 1892, nearly thirty years, on the shore of this lake, and close to it, filling over 10 acres of territory in the lake from the debris that had been taken from its mine on the shore. The Cleveland Iron Mining Company had been mining on the northeast portion of this lake and on the shore and under the waters of the lake since 1887. The Lake Superior Iron Company were mining on the shore of the lake and under the lake directly north from the complainant's mine. To call pumping out this lake, which the evidence shows was about thirty feet deep in its deepest place, the *draining and reclaiming of swampy ground, and therefore of little value*, is a remarkable holding of fact under the evidence. It has no force.

It appears from this evidence, that this property had been known by both complainant and defendants for many years from their mining operations contiguous

thereto to be very valuable for mining iron ore. That the lake lay in one of the richest belts of the iron ore formation in the famous Lake Superior mineral region; and was surrounded by the largest mines in that region, and as shown by the evidence was then known to be very valuable.

VII.

COST OF MINING ON DISPUTED TERRITORY.

Profits therefrom to the Cleveland Iron Mining Company.

E. F. Bradt, mining engineer employed by complainant in the Lake Angeline Mine, testified, that from his examination of the workings of the Cleveland Iron Mining Company south of the "diorite division" and north of the south line of section 10, he estimated the amount of ore that the Cleveland Iron Mining Company took out from this disputed territory to be 120,000 tons. That would be up to his examination of the property in December, 1895, and the making of the maps furnished to him by Mr. Jopling, the mining engineer of the Cleveland Iron Mining Company, of the workings where the mining was done on the disputed territory, which map is complainant's Exhibit "H" (see p. 44 of Record), also offered by the defendant the Cleveland Iron Mining Company as its Exhibit 21.

Witness Bradt testified, that as engineer, he made a survey of the drifts and stopes in this disputed territory at that time, and estimated the quantity of ore

taken by the Cleveland Iron Mining Company. That he made his estimates from his own experience in mining. That he was acquainted with the cost of mining such ore in such an ore formation. That it was a part of his duty to examine into such things.

(See pp. 44, 45 of Record.)

The witness was asked the following questions:

Q. What would you say during the last three years on the average would be the cost of mining that ore and putting it into the skip and hoisting it to the surface per ton? A. Not including surface?

Q. Not referring to any outside expense of taxes or anything of that kind? A. Sixty cents a ton.

Q. Would that be a conservative estimate? A. I should consider it so. Aside from the expense of taking the ore to the surface there would be charged against the ore as a part of its cost when ready to be shipped from the mine its proportion of the expense of the mine, such as office force, agents, taxes and all other expenses connected with the mine, expense outside of the mining referred to under the estimate of sixty cents.

Q. Have you any way outside to state what would be the total cost, including the sixty cents, of the ore on the surface, covering all of those additional expenses you have referred to? A. About $1.10.

Q From your personal knowledge outside of the actual mining, which you say cost sixty cents, do you make your total estimate $1.10? A. Yes, sir.

(See p 45 of Record).

The same witness further testified, that the workings of the territory north of the south line of section 10, as shown on the map of January 22, 1896, Exhibit "H", is properly shown, so near as he could transfer it from one map to another. That he copied it from the map

that Mr. Jopling had given him. That he had nothing to do with selling ore; knew nothing about the selling price. That in driving the drifts after they got through the diorite division between the north and south ore formation, the ore taken out of the drifts would pay for driving them.

(See p. 45 of Record.)

So, it appears from this evidence, that except where the drifts were in rock, which would be the diorite drift of 640 feet (p. 42 of the Record), and the cross drift mentioned as 300 feet, the other drifts were paid for by the iron ore taken out from them, and the only cost of drifts that can be charged up against the profit on the mining would be the cost of driving the diorite drifts.

On cross-examination Mr. Bradt further testified as to complainant's Exhibit H, that the map was furnished to him by Mr. Jopling. That he did not examine its accuracy by actual measurements. That he did not compare Mr. Jopling's surveys with the map or make any measurements after receiving the map, to determine its accuracy; nothing more than by his observations while passing through the stopes and workings. That he did not compare this map with any other map previously made by himself. (See p. 55 of Record.)

He further stated that he obtained knowledge of the situation north of the south line of section 10, from visits through The Cleveland Iron Mining Co.'s workings since it opened up that work. That this work which he spoke of was all done in the years 1895 and 1896. That he made various visits there, but cannot give the dates; that he obtained his information as to the extent of the deposit on the north side of the section line from the visit that he made to the workings of The Cleveland Iron Mining Co., and from the inter-

change of maps between himself and the engineer of that company; that he has an opinion as to the life of the deposit of The Pittsburg and Lake Angeline Iron Co. south of the south line of section 10, and it is that there is a large quantity of ore there below the second level; that the quality of the ore on the north side of the line, where the defendent, (Cleveland Iron Mining Co.) is working the deposit, is of the same good quality of ore as the complainant has, close to the line on the south side; that the two deposits are of the same quality, and that he should say that the quantity was about the same on each side of the line, and that he cannot answer the question positively. (See pp. 56 and 57 of Record.)

Thus it appears that there were very large deposits of soft Bessemer ore of the very best quality, which have been cheaply mined, in the disputed territory north of the south line of section 10, as well as in the workings of The Pittsburg & Lake Angeline Company, south of the south line of section 10; and that a large quantity of this ore was mined each year by the Cleveland Iron Mining Company from the disputed territory; that the Cleveland Iron Mining Company was not only mining on its own territory, lot 2, Sec. 10, on the north side of the lake, but was also mining very large quantities of valuable ore from the disputed territory on the south side of the lake, and up to the south line of section 10, tramming the same out to the north of the lake through the diorite drift to its shaft on lot 2 north of the lake; and in the years 1895 and 1896 it took out of this disputed territory, according to the estimate of Mr. Bradt, at least 120,000 tons of this very valuable Bessemer ore, of fine grade.

On cross-examination the witness, Bradt further testified, that he took the length of the drift from the

Cleveland Iron Mining Co.'s map. That he did this within the last week or so. That he estimated the quantity of ore taken out from the maps and his general observation passing through stopes and rooms and looking about. That he had no instruments with him when doing so. That he determined the quality of ore by examining it. That he can judge quite accurately as regards the percentage of iron ore by looking at it; has had experience in that matter. That he looked at the ore in the workings in the stopes where they were mining. That the ore in a body is not always of the same quality. That his estimate of the quality of the ore was not based on the idea that everything was good, but estimated it for one grade only. (See p. 65 of Rec).

Witness was asked the following question:

Q. I want to ask you, Mr. Bradt, if it is not true that you *guess*, not only as to the quantity, but that you guess as to the several grades and quantities in each grade in the same general way? A. *No, sir; I do not guess.* I have described it to you by the use of maps and observation. I could estimate the quantity taken within the triangle when I know its limits. I could make an estimate from my knowledge of the workings and information I have from the maps. I don't call it a guess; a guess hasn't any information whatever to base it upon. (See pp. 65 and 66 of Record.)

On re-direct examination the witness Bradt further testified that the Pittsburg & Lake Angeline Iron Co. *began mining* on this south vein south of the south line of section 10 *in the spring of 1892.* That the Cleveland Iron Mining Co. drifted through the diorite formation to the north of the lake referred to, into the ore formation just north of the south section line of 10 so as to begin mining iron ore in the *fall of 1894.* That they did not mine any ore north of the south

line of section 10, and south of the diorite division line, *before the years 1894 or 1895.* That the *workings of the Pittsburg & Lake Angeline Iron Company* south of the south line of section 10, *showed very plainly from the dipping of the ore formation,* that the *same body of ore* was going north of the south line of 10 in its workings; and that information of this fact was *communicated* by Captain Walters or Mr. Kidder to Captain Mills, the agent of the Cleveland Iron Mining Company; and this is one of the ways that the company learned of the existence of this valuable deposit of ore. (See p. 66 of Record.)

Mr. Bradt further testified, that a man skilled in mining can tell what course the ore is taking; could discover it from the pitch of the formation, and whether it was pitching to the north side of the line. That this matter was talked over in the presence of Captain Mills before he put in diamond drill holes; and that he supposed the information Mills got from Captain Walters and other employes of the Lake Angeline Co. was what caused him to go in there and mine. That the character of the ore north of the line was just the same as south of the line; generally in a definite fixed ore body between the foot and hanging walls of the mine. Such ore is generally of the same character. There may be different qualities of ore, but this is the general rule within a reasonable limit of distance (see pp. 66 and 67 of Record.)

On re-direct examination commencing on page 57 of the Record the witness testified as follows:

Q. I am asking you in reference to what you saw while in defendant's mine; what were the indications from the openings of defendant's mine on the north side as to where the largest body of ore is? A. Well, so far as developed and opened up at present, it would

indicate that the larger body is on the south side of the line, from any information that has come to my mind.

That is my honest judgment from any information I have. I express a limit to my information, because I cannot see what drill holes might open up.

Q. Do mining engineers estimate from what they cannot see; have you done so? A. Yes, sir; my opinion is, that there is about the same quantity of ore on the north side as on the south side. I knew of the defendant company's putting some drill holes into this territory on the south line of section 10 under the water of the lake, in the fall of 1892: I knew the drill hole put in by the Cleveland company from its north side workings through its south deposit through the formation. As shown by its maps, I know where the drill hole stops.

This is the drill hole that was drilled from the north workings of the Cleveland Iron Mining Company through the diorite rock to its south workings on the disputed territory, as shown on complainant's Exhibit "F" and extends from the dotted line marked on Exhibit "F" "outline" of ore body, diorite foot wall, in a southwesterly direction to the south line of section 10; the total length of the drill hole being 970 feet, as shown by Exhibit F; 640 feet of which was driven through the diorite division rock, and the balance in the ore formation in the disputed territory (see p. 58 of Record).

I cannot tell you whether this was drilled through in 1890 or not. I have known of the drilling since it was done. After that time, the Cleveland Iron Mining Company put some more drill holes into the territory in the south side of the line between September, 1892, and the following months. They got permission

from the complainant company to go on south of the line. I don't know who they obtained the permission from. I know they had the permission. I obtained my information from Captain Mills. I suppose their purpose in drilling the holes from the south side of the line into the territory on the north side was to explore the territory. They found ore of good quality; I don't recollect how much. From the south side of the line, the Lake Angeline side, they drilled five holes. They started the holes in the Lake Angeline mine at the first level. I was there every day. I don't know whether Captain Mills kept track of it or not. I don't recall their reporting to us daily. Their object was to find ore of their own on the north side of the line. I know they found ore there. I do not recollect if it was found in all the holes. Some holes were sunk in this territory just north of the line, in addition to those holes run in from the Lake Angeline mine, and were sunk from the surface. I think there were five holes. Those holes were sunk perpendicular to reach this same deposit that the Cleveland company were after, I suppose (see pp. 57 and 58 of Record). Our company did not interfere with them in any way in their finding ore there. I suppose Mr. Kidder knew about their drilling these holes. I know that Mr. Kidder was present at the office of the Lake Angeline Company often. I know, as I have stated before, that what information I had was from Captain Mills, and that consent had been given to drill these holes. I do not know what the Cleveland Company did after finishing these holes. I know that they commenced to run a drift across from the north side to the south side of this 640 foot diorite rock. I did not include that in my estimate of the cost of the ore taken out; neither did I include in that estimate the cost of pumping

Lake Angeline. Lake Angeline was pumped out. I am not aware that our company take any part in pumping the lake, that is, in keeping it dry. I do not know what was the date when those surface drill holes were put down on the north side of the line, the perpendicular holes. My impression is that it was after the holes were run in from the south side in 1892. I should presume the following summer. My recollection would be the summer of 1893. The map shows five surface holes. Four of the drill holes sunk from the surface just north of the south line of section 10 by the Cleveland Iron Mining Company were put down in the Lake bed, or the ground which once was under the water of Lake Angeline. One is located near the railroad track as shown here; another near one of the drifts leading west; another apparently in the drift leading east: and another, the fourth, to the east of the workings, as shown on this map Exhibit 28. Three of these holders were within the territory that is indicated within those dotted lines running from the center and called "Pittsburgh & Lake Angeline Iron Company's territory," as marked by me upon map Exhibit F. These drill holes are all marked on our map (see page 58 of Record). The drill holes running from the Lake Angeline side of the line were drilled to the northwest, and I believe one to the northeast. The point from which those drill holes were started was under the bed of the lake on the south side of the line, and the direction they took was northwestward across the line into the bed of the lake—all of them but one, which I think was run northeast toward the upland. Possibly two were drilled to the north; all of the rest were run under the bed of the lake. These drill holes, three of them at least, run northwestward within the dotted lines within the disputed territory, as shown on map F.

(See pp. 50 and 59 inclusive of the Record).

Thus it appears, by the testimony of the witness Bradt, that the ore under the disputed territory is but the continuation of the ore deposit *discovered by the complainant in 1892*, in sinking its shaft south of the line and the driving of its drift at the bottom of the shaft to the north to the line; the Cleveland Iron Mining Company was allowed by Mr. Kidder and Captain Walters to go upon the complainant's property, and drill from the bottom of its shaft through the deposit of ore which they had discovered extended to the north over the line; this they did upon the supposition that the Cleveland Iron Mining Company was the owner of the territory north of the line, on account of the opinion in Clute v. Fisher, 65 Mich. 48. It is clear that the Cleveland Iron Mining Company *did not discover this deposit*, but that the discovery was made by the complainant. In fact, the mine was opened up under the lake by the drift driven from complainant's shaft, by its employes, to the south line of section 10, in the ore, and *before* Captain Mills of the Cleveland Company knew of it. It cannot be justly claimed by counsel for the Cleveland Iron Mining Company that it has any equities on account of the discovery of this large and valuable deposit, as it had nothing to do with its discovery; it was made by the employes of the complainant; and, by the evidence, it is beyond contradiction that The Cleveland Iron Mining Company, through complainant's shaft, drilled into this large deposit of the best quality of Bessemer ore, which was easily mined at slight expense; it has realized a very large profit over and above all expenditures from the mining done there, and it has no equities as against the complainant in this territory in dispute, beyond the value of the ore which it took out before notice that complainant claimed title.

The witness Bradt further testified:

Q. What was the purpose of your obtaining this map, Exhibit G, from Mr. Jopling? A. I accepted it as a gift from him. It is a common courtesy between us to exchange maps whenever it is convenient. I think that is my own dotting.

Q. Then this map, Exhibit G, is not in the same condition or state it was when received from Mr. Jopling? A. He evidently transferred from the map that I furnished him onto one common map, showing the workings of both mines, and this map was made from that; and I have no question or doubt but what it is correct as transferred.

Q. Then this map, Exhibit G, is composed from data of Mr. Jopling of the workings of the Cleveland Company's mine, and data furnished by you of the workings of the Lake Angeline Company's mine? A. Yes, sir.

Q. And it was compiled by consent of yourself and the willingness of Mr. Jopling, for the purpose of showing each other what the other was doing? A. Yes, sir; in December, 1895.

(See p. 61 of Rec.)

Exhibit G appears upon page 43 of the Record.

The witness further testified:

The map "220 Foot Sub Level" (appearing upon page 44 of the Record) was furnished to me by Mr. Jopling January 22d, 1896; that is the date of the map, showing a trespass over the line made by the Cleveland Iron Mining Company upon the Lake Angeline Company, on the territory south of the south line of section 10, made in 1895. I believe Mr. Jopling discovered the trespass in the fall of 1895, or the winter of 1895 and 1896, and reported it to me.

(See pp. 61 and 62 of Record.)

From this Exhibit, showing the drifts and workings of The Cleveland Iron Mining Company, north of the south line of 10, on the disputed territory, it will be seen, when comparing it with Exhibit G, page 42 of the Record, how rapidly The Cleveland Iron Mining Company prosecuted mining operations between the time of making Exhibit 'G' and defendant's Exhibit 21—the "220 Foot Sub-Level" map; and which points out that The Cleveland Iron Mining Company had mined out a large quantity of territory between the time of the making of the two maps. Mr. Bradt states that in the year 1895 and 1896 The Cleveland Iron Mining Company mined at least 120,000 tons of Bessemer ore (see p. 44 of Record.) And The Cleveland Company has continued this mining upon the disputed territory to this date, and with the same vigor; and it is fair to say, that at least 60,000 tons more were mined in 1897, and probably very much in excess of that, and each year thereafter; which fact will appear upon an accounting between the parties on a decree in favor of the complainant.

On re-direct examination, the witness Bradt testified:

The character of the ore north of the line was just the same as south of the line. Generally, in a fixed ore body, between foot and hanging walls, there is generally similarity as to the quality of the ore. There may be different qualities, but that is the general rule within a reasonable limit of distance. I saw the stock piles of ore, that was brought out of the workings by The Cleveland Company south of the dotted line from a distance.

Q. Now, taking these drill holes you speak of, five down in the mine there and five others from the surface, as drilled by The Cleveland Company, can you form an estimate of the cost of those drill holes from

the experience you have had in drilling such kind of holes in such places; that is the outside cost? A. I presume I could form an opinion. I am hardly prepared to do so without thinking it over; I will think it over and give you an estimate. (See pp. 66 and 67 of Record.)

The witness also testified:

So far as I am able to plat it from the maps of The Cleveland Iron Mining Company, this map Exhibit 'F' marks down correctly the length and location of the drill hole, through the quartzite belt in the south half of section 10, and is a line marked on the map, "drill hole 970 feet long." That is the length of the hole to the best of my knowledge. I have had experience and knowledge of the expense of such drilling through quartzite, and through ore such as has been described in the location where this hole was drilled.

Q. What do you say was the cost, at the time that was put in, per foot, drilling through the quartzite? A. I estimated that, covering all expense, at outside figure would be $2,910 to drill the entire hole through the diorite; it is not quartzite; that would be drilling from the north deposit of ore through to the south line of section 10, and would be on the course we have marked out on the map, and 150 feet below the surface. This drill hole was from the workings on the north side of the diorite; not from the bottom of their shaft of their workings. I don't know but their shaft may have been below that. It was from the ore body as it came up to the diorite rock through to the section line, as shown on their maps from the maps furnished by Mr. Jopling that I have referred to. I estimated the cost to be about the same as drilling through jasper.

Q. You speak of five holes from the surface as drill-

ed; can you give us—that is on the Cleveland Iron Mining Co? A. Five within that dotted line; within the jasper territory.

Q. South of the line marked 51 degrees north 49 minutes west (being the north boundary of disputed territory); there were three holes south of that dotted line? A. Yes, sir.

Q. What do you figure the expense of putting these holes down to be? A. About $2,112.

Q. What do you mean about the outside? A. The outside; I know the depth they have given. I have taken it from their map; the depth given upon the maps of the Cleveland Iron Mining Company.

Q. You speak of five drill holes from the workings of The Pittsburg and Lake Angeline south of the south line of section 10, through to the north, across this disputed territory, and over into the territory of the Cleveland Iron Mining Company, beyond the dotted line; will you state what would be the outside cost of those drilled holes? A. $3,438.

(See pp. 68 and 69, inclusive, of the Record.)

Witness further testified that after the discovery of this body of ore Captain Walters gave information to Captain Mills that the ore was sloping from The Pittsburg & Lake Angeline workings over under the lake north of the south line of section 10, and he showed these workings to Mr. Mills and his mining captains, Read and Tregambo, and that he was present at the time, and Captain Walters pointed out to them that the trend and pitch of the ore formation extended over and across the section line. (See pp. 69 and 70 of Record.)

Witness further stated that he surveyed the dividing line between the workings of the complainant and the Cleveland Iron Mining Company in the mine be-

low, which would be the south line of section 10, extended through the mine and its workings. That he did this with instruments, putting in pieces of timber and driving nails and spikes, for the purpose of locating this south line of section 10. That he did it by direction of his superior officers, either Mr. Kidder or Captain Walters; does not remember which one. That the workings of the two companies came together in one deposit. That the line between these workings was an imaginary one, and this he located by the driving of the nails. That the ore was of the same quality in the two deposits. (See pp. 71 and 72 of Rec.)

On re-cross examination the witness testified that he first went to the Lake Angeline mine as an employe of that company in 1889. (See p. 125 of Rec.)

He also testified as follows:

Q. In that place on the north side of this south line of section 10 reached by the diamond drill work, no one could tell with the diamond drilling that was done there whether there was any extent to the deposit on the north side of the south line of 10 or not, without subsequent opening up of the ground beneath by drifts and levels; isn't that true? A. Well, if you refer to the five drill holes drilled from the underground workings of the Lake Angeline, I should say it would not be necessary to drive the drifts, on account of the pure quality of ore that they obtained from it. (See p. 74 of Rec.)

Q. Is this the record of the five drill holes? A. Yes, sir; it shows remarkably good ore to the north; drilled northeast; drilled from the south side of the line to the north and northwest; and these records show the ore on the north side of the line * * *

Q. Will you call my attention to these two other

holes run northeast from your first level? A. Yes, sir; they were both in ore from there north of the section line; the hole was 427 feet, a trifle more * * * (See p. 75 of Rec.)

Q. Can you tell anything about the length of a vein of ore bored by a diamond drill without developing it? A. Not without several holes; not from this one hole; of course we don't know the length or height of it.

Q. can you tell the width of it in every place and its length by several drill holes? A. You often can.

Q. Have you, during any of your business in the location of drill holes? A. Yes, sir; quite a number of times.

(See p. 75 of Rec.)

The witness further testified, on re-direct examination:

Q. Speaking about these five holes showing the value of the quality of ore; does the ore body lie as a rule between rock walls, foot and hanging? A. As a rule, yes, sir.

Q. Was that the case with this formation we are talking about? A. Yes, sir.

Q. Then does the drilling at intervals—drilling at one point and then at another along the formation, or across the formation—determine the body of ore there, and quality and continuation of the quantity? A. Yes, sir.

(See p. 84 of Record.)

Alfred Kidder, the local agent of the complainant, testified as follows:

I have heard the testimony in regard to opening this south deposit just over the south line of section 10 upon the territory in dispute. * * * I understand that at the time, or before mining was done by The

Cleveland Iron Mining Company, Captain Walters had a talk with the officers of The Cleveland Iron Mining Company about the matter. I did not have a talk with Captain Mills. I think it was in 1889. I requested Captain Walters to tell Mr. Mills of some ore we had found, which we were pretty sure would lead on to that territory. We had a diamond drill hole about 30 or 40 feet south of the quarter post on the north and south center line of section 15, and it went down at a pretty high angle to the south; it went through very fine blue hematite ore, as I remember, and went through 30 or 40 feet of it, quite a little deposit of it; and from the nature, and from what we knew of the general formation there, we were very sure that it would go over the line (see p. 98 of Record).

I requested Captain Walters to see Mr. Mills and tell him about it; tell him that it would go to the north of the south line of section 10, and extended from the north and east; we knew it was lying pretty flat from the way we went into it; we could not tell which way the ore formation trended by the drill hole; we knew that anyway. We knew the formation was similar with it all along there; it was trending to the east, pitching to the north, as it is called. I did not have a conversation with Captain Mills after directing Captain Walters to inform him, as to whether he did so. We began our shaft after drilling the hole in 1889 and 1890, but it was not because of that drill hole; we didn't consider that it indicated anything very positive. That shaft which we sunk was done for the purpose of cross-cutting that valley there at a depth; we had been drilling for a long time *along the shore*, and we couldn't get down, we met ground so badly caved in so we couldn't get a hole down at it, and I finally told the captain I was willing to take the bull by the horns, as

it were, and sink a shaft down there and cross-cut, and then if we didn't find anything in that cross-cut, I felt so sure there was ore up that valley, we were willing to spend the money * * *

Q. I show you the point on this Exhibit F, south of the south line of section 10 marked "Shaft House"? A. That is it; that is the point on lot 3, section 15; that was called the 16th post on the line right on the shore of the lake. *We got as near the lake as we could. We started sinking the shaft in 1890, and we commenced driving the drift in the spring of 1891. We struck ore I think in the shaft about the first of May or thereabouts, May or June, 1891. We went through this ore, which proved to be the north side of the fold we had. This was only a few feet from the south line of section 10.* After putting that shaft down we put a drift across and cross-cut, and we struck the north side of a fold, and then drilled and struck out a distance of about 330 feet. I think it was the south side of the fold. That gave us the knowledge that *we had a regular fold of ore there*, which we believed to be continuous down as well as in length. Then we drifted to the west of the north rim of that fold *until we got up near the line. That indicated very strong probabilities that the ore would be continuous on over the line onto section 10; we felt very sure of it. I gave this information along in 1892. We had progressed far enough then to know that it would probably go over the line* (see pp. 98, 99 of Record).

I heard the testimony of Mr. Bradt, that Captain Mills was given permission by us to drill from the bottom of our workings, which I have described to the north. I remember that Captain Walters had a conversation, I think, with Mr. Mather underground, and he spoke to me about it, and I said I should be very glad indeed to have that done, and we were willing to

furnish the compressed air for the Cleveland Company, and we would keep an account of it. By that I meant the compressed air for them to use with their drill in this drift."

(See pp. 166 and 167 of Record.)

The witness further testified: "*I supposed at that time that the section line formed our north boundary*, and my *first* information that that was not so, was when I got Mr. Clark's opinion *in February, 1896*. I then gave *notice* to the defendants that they were *upon our territory*, the territory of the complainant. There was notice given to both of the defendants, I think it was *October 29th, 1896*. From statements of mining experts as to the quality of the ore that came out of The Cleveland Iron Mining Co. workings within the disputed territory, I have understood it was very rich; a high grade of Bessemer ore. I have an idea of what such ore is worth from experience; and what it cost to mine such ore. I think it should have been mined for 55 to 60 cents, and put it in the stock pile, charging up nothing for preparatory work, or general expense. I think The Cleveland Iron Mining Co. began the mining in this territory, south of this dotted line, some time in the spring of 1895.

Q. Now what expenses would there be, general expenses, above the 55 or 60 cents you have mentioned as cost per ton, that should be added to cover all other expenses in connection with the mining; what are those expenses? A. All of the things that go into the fixed cost; the salaries of the officers by the month, and taxes and repair account.

Q. Do you mean the men working in the mine? A. No, I mean the agent, superintendent and foreman and mining captain, and everybody who is generally

employed around a mine; head machinist and head blacksmith, and all those men; they make up the fixed cost.

Q. Taxes and things of that kind? A. Yes.

Q. What would you say that ore would cost in 1895, with those expenses added? A. I think $1.10 would be a reasonable estimate; an outside estimate.

The selling price of such a quality of ore in Cleveland at that time during that year; the average selling price, was $2.90 for ore of that grade.

The profit would be in the neighborhood of 60 cents. That year railroad freight was 32 cents a ton, and vessel freight about 75 cents, and probably ten cents for general expenses, including insurance and expense of the sale; that would be 63 cents profit at those figures. The selling price of that quality of ore in 1896 was $4 a ton, and expenses about the same as the year before, and the profit is the difference.

(See pp. 99 and 100 of Record).

Captain Thomas Walters testified:

That he was employed fourteen years ago as mining captain of the Pittsburg & Lake Angeline mine, and became mining superintendent eleven years ago, and as such, his duty was to lay out the mining work in the mine, under the general supervision of Mr. Kidder. (See pp. 115 and 116 of Record.) *We began sinking a shaft in the east end mine in 1890, near the 16th post on the south line of section 10, as located on the map made by our engineer.* This shaft was completed down to the first level *in March, 1891.* Before sinking the shaft we did diamond drilling; we reached the ore formation by drilling, that is, siliçious ore. From the drillings we formed the idea, that it was proper to sink the shaft. After doing this exploratory work and

sinking the shaft, I had a conversation with Mr. Mills, agent of the Cleveland Iron Mining Company after we struck the ore. I talked the matter over with him frequently; interchanged views. We struck the ore in May, 1891, with a cross-cut drift from the shaft at the first level. We drifted to the line and a few feet over the line. At that time I told Mr. Mills what I thought about the ore there. This was about in March or April, 1892.

(See pp. 116 and 117 of Record.)

Thus it appears, that the employes of the complainant sunk its shaft, and drove a cross-cut drift *to the south line of section 10, and over that line a few feet, discovering the ore* bodies north of the section line. After that Mr. Mills, the agent of The Cleveland Iron Mining Co. was *informed* by Captain Walters of the discovery of the ore. Walters said to Mills in substance, that he had ore on their property, referring to the territory north of the south line of section 10; supposing at that time it belonged to The Cleveland Iron Mining Company. He also informed Mills as to the indications of ore over the line. And about three or four months after, Mills applied to him for permission to drill from the bottom of their workings across to the north, over onto section 10. Captain Walters talked it over with Mr. Kidder, and they decided to give him permission, and his recollection is that he drilled five holes there. He saw them as they were drilled, and they found the continuation of the ore body there on section 10.

Captain Walters further stated, that some years before that, Mr. Mills drilled a hole from their old workings at the north, and that they had a good deal of conversation about that hole. That it was from the workings over north of the dividing diorite rock. That

Mills told him that they did not strike any ore. That they had found nothing but jasper passing through schist or diorite.

(See p. 117 or Record.)

He stated this hole is the one marked on complainant's Exhibit F as 970 feet long, through diorite, down to the south line of 10. That in his judgment, the drilling of this hole to the south line of section 10 cost on the average $3.00 a foot, which would be for the 970 feet, $2,910 (see page 118 of Record).

Witness further stated that as the complainant furnished the power to drill with, in driving the five holes from the bottom of their mine to the north, the drilling did not cost the Cleveland Iron Mining Company over one dollar a foot, as the substance through which they drilled was paint rock and ore, soft drilling.

He further stated that paint rock is frequently found in the ore, and is of a soft nature.

Witness further stated that he had been down the shaft of The Cleveland Iron Mining Company over to the north of the lake, and had passed through the drift, through the diorite. That he had been in the workings of The Cleveland Iron Mining Company north of the south line of section 10, on the south lay of ore, south of the diorite. That he has been there three or four different times. That the last time was in the spring of 1896. That from these three or four examinations he is able to state that there was from *forty to fifty thousand tons of ore taken out at that time from this south working.* This would be about January, 1896. That he wasn't here in March. That it was the last time that he was in those workings. That this ore was taken by The Cleveland Iron Mining Company from the south body through the shaft to

the north of the lake, and out of the shaft there. That the ore was of a high grade hematite (see page 118 and 119 of Record).

This witness testified that it would cost 35 cents for mining and securing the ground. Timbering the mine, 15 cents a ton; loading and tramming, 6 cents; making 56 cents in all. That there would be other expenses, such as the salary of the bosses and the captain; which would make the cost of the ore 60 cents a ton put into the skip for hoisting (see p. 119 of Record). That all other expenses, such as taxes and those not previously mentioned, would make the ore cost somewhere from $1 to $1.10 when loaded on the cars for shipment (see p. 119 of Record).

This witness further stated that The Cleveland Iron Mining Company could mine their ore just as cheap as the complainant, as there was no difference in their management, or in the character and quality of the ore. That the ore mined by The Cleveland Iron Mining Company was but a continuation of that mined by The Pittsburgh and Lake Angeline Company. That it would go 67 per cent in iron and .028 in phos., and the two ores from the two workings were just one thing, the same as the yolk of an egg; you couldn't tell the difference; there was simply a dividing line between them. That the freight on this ore from the mines to Marquette was 32 cents, and the boat rate from Marquette to Cleveland was 75 cents. That he could not say what was the insurance or commission for selling. That he did not know there was any commission.

He further stated that he did not know the selling price (see p. 120 of Record).

Witness further stated that from examining the workings of the Cleveland Iron Mining Company in

the deposit in question, he noticed that they were crowding the mining work there; and that they must have been working over 100 men the early part of 1896. That with double shift they would mine 500 tons in a day; that it was an easy ore to mine, and that The Cleveland Iron Mining Company prosecuted the mining with vigor since the time it opened up). That he understands this from his own observation (see pp. 120 and 121 of Record).

It will be noticed that 500 tons a day in twenty-six working days would make 13,000 tons a month, which would be 156,000 tons a year, if the work was prosecuted as vigorously during the winter months as the summer.

Mr. Bradt, the mining engineer, testified as quoted above, that from passing through the south workings of the Cleveland Iron Mining Company his judgment would be, that in 1895 and 1896, 120,000 tons of ore were mined. Thus it appears that his statement is very conservative indeed.

It also appears from Mr. Kidder's testimony, quoted above, as well as Captain Walters, and engineer Bradt, that 60 cents a ton was the cost of mining the ore and putting it in the skip; and that with all other expenses added, it would cost from $1.00 to $1.10. Hoisting and loading in the cars, and freight to Marquette, 32 cents; shipment from there to Cleveland, 75 cents.

By Mr. Kidder's testimony, insurance and commissions, 10 cents, which with all other expenses on surface, taxes, salaries, etc., total $2.27 cents. In 1895 the selling price of this quality of ore in Cleveland was $2.90, making a profit of *63 cents;* in 1896 the price was $4.00. From that substract $2,27, the above stated cost, and there remains for that year a *profit* of *$1.73 a ton*, or an *average* price for the two years on 120,000

tons at *$1.18 a ton, the profit would be $141,600, without* considering the profits for the year 1897. $200,000 is a small estimate of the total profits to 1898.

Mr. Mills, the agent and mining captain of The Cleveland Iron Mining Company, also testified on cross-examination as to the cost of mining in substance as follows:

"We began mining ore in 1895. We mined 40,000 tons that year. It was first class Bessemer ore; averaged from .030 to .035 in Phos. and 65 per cent in metallic iron—the very best of Bessemer ore."

That he estimated the cost of producing the ore that year which was largely from "opening up work and development work" at $1.25 a ton (see p. 190 of Record). Thus showing that there is only a difference of 15 cents between the estimated cost as made by the witnesses Kidder, Walters and Bradt, and that stated by Mr. Mills; Mr. Mills stating as explanatory of its costing that amount the first year that it was because it was in doing opening and developing work.

He further testified as follows: "Well, perhaps, I might explain, that the expense of mining the ore the first year was necessarily higher because of the expense of developing and opening a new deposit and developing things that had to be done."

Thus, he includes much of the expense of opening up a new deposit the first year in his estimated cost of $1.25 a ton for mining.

He further testified, that he left the mine in February, 1896, and had charge of this development only one year. That he had nothing to do with the selling of the ore or fixing the freights (see p. 190 of Record).

He further stated that the cost of driving the drift through the diorite division, which was the drift from the mining work on the north side of the lake, where

The Cleveland Iron Mining Company began mining under the lake in 1887, in the north fold of ore there through the diorite division between the north fold and the south fold of the ore, as testified to by Mr. Kidder, and he stated that the average cost in driving that drift was $15.00 a foot, which included driving the drift $8 a foot and other extra expense. This witness further stated, that the rails used in the drifts for tramming the ore were forty pound steel rails, costing $35 a ton (see p. 190 of Record).

It will thus be seen from Captain Mills' testimony, that he corroborates Kidder, Walters and Bradt as to the quality of the ore; and as to the cost of its production; except that he makes it a little higher; fifteen cents more, on account of the extra expense the first year in opening up the mine. Thus suggesting that the second year it could have been mined cheaper, which it probably was, after he left, as estimated by complainant's witnesses.

To arrive at the profit which The Cleveland Iron Mining Company realized, from mining the ore on this disputed property; if we take from the estimate of 63 cents profit as fixed by Kidder and the other witnesses of complainant, the fifteen cents which Capt. Mills added to the expense of mining, there would remain 48 cents profit, according to defendant's witnesses. Capt. Mills states that there were 40,000 tons mined the first year. This would be at the 48 cent profit on each ton; total, $18,200.

Now, it appears by the uncontradicted testimony, that when this profit, which we have just stated was realized, ore selling in 1895 for $2.90, the next year for $4.00; the expense of mining being the same; and the estimate of quantity of ore taken out in 1895 and 1896, as made by Capt. Walters and engineer Bradt, was

120,000 tons. As 40,000 tons were taken out in 1895, that would leave 80,000 taken out in 1896; and the profit per ton that year was $1.73 per ton when the ore was selling for the $4, according to Mr. Kidder's testimony, and no one contradicts it. So that the profit in 1896 was $138,400; total profit for the two years—1895 and 1895, $156,600. As to this estimated profit it will be noticed that it is arrived at from the testimony of the witnesses for The Cleveland Iron Mining Company, where there was any contradiction as to quantity or price; and from the witnesses of complainant as to amounts, where there is no contradiction; and where their testimony is all there is, as to such amounts and values. So there is no chance for contradiction in this argument as to the profits realized. It is therefore safe to say, that if the accounts as kept by The Cleveland Iron Mining Co. of the quantity of ore mined in this disputed territory during those years, and of the price realized therefrom, had been produced in court, it would have shown at least as large a profit as here estimated, and probably larger. We think this a fair deduction from the proof; from the failure of that company to produce its accounts of the work.

Having thus arrived at the profits realized by The Cleveland Iron Mining Co. for the years 1895 and 1896, in arriving at the equities of this case, we should inquire as to what was its expense for "dead work"—such as exploratory and other work, opening up this deposit.

First, then, as to the pumping contract:

It is claimed by the defendants that they paid a larger proportion of the pumping expense under the pumping contract under the apportionment of the amount to be paid in proportion to the supposed acreage of each. It can be found from the testimony of

the witness Bradt, that the acreage in dispute between complainant and The Cleveland Iron Mining Co. is 10.84 acres, as appears in complainant's Exhibit "F". It also appears from the proof and Exhibit "F", that the total acreage of the lake is 148.60. The Cleveland Iron Mining Co. have paid under that claim, one-fourteenth *more* of the entire cost of pumping expense than was its share—call it one-tenth more in order to make it ample. This was paid on the share of the disputed territory.

It appears from the statement of Mr. Youngbluth, the accountant of The Cleveland Iron Mining Company, given from its books, that the total expense under the pumping contract was $76,488. One-tenth of that is $7,648.80. This amount should be charged back to complainant on a decree and accounting in its favor. (See p. 220 of Record.)

The same witness testified that the total cost of equipping the south side deposit on the disputed territory was $25,000. This includes cars, tram track, drilling machines, and everything used in the mining of iron ore. The most of this equipment is portable and can be removed as personal property—not a fixture of the mine. But in making this accounting between expenditures and profits realized by the Cleveland Iron Mining Company on this disputed territory, we charge in the $25,000 against the profits, and also add the cost of driving the 640 feet of diorite drift from the mining work of The Cleveland Iron Mining Company on the north side of the lake, through to the iron ore in the south fold under the disputed territory. By the testimony of Captain Mills this cost $15 a foot, $9,600 (see p. 199 of Record). To these expenses add the cost of a lateral drill holes from the ore formation north of the diorite across to the south side of the dio-

rite into the ore in dispute 970 feet at $3 a foot (the price testified to by Captain Walters and Engineer Bradt and contradicted by no one), amounted to $2,910 (see p. 118 of Record). Also the cost of five drill holes from the surface, $2,112. Also drilling five other exploratory drill holes from the territory of the Pittsburg & Lake Angeline Iron Company as testified to by Engineer Bradt, $3,438. As to this last item, Captain Walters states that he having furnished the compressed air for doing this work, and as the rock was soft it would not cost over $1.00 a foot to drill it and this would reduce the cost to $2,000 (see p. 118 of Record). But allowing the higher estimate of $3,438, so as to give the outside price that could possibly be claimed, we have the total expense incurred by The Cleveland Iron Mining Company for preparatory work and every other expense, not already deducted in figuring the balance due for profits after allowing for the cost of actual mining, we have the following debit against these profits:

STATEMENT OF ACCOUNT.

Drilling holes from the mine of defendant Cleveland Iron Mining Co., north of the lake through the diorite into the ore in the disputed territory on Sec. 10, 970 feet, $3 a foot	$ 2,910.00
Driving drift through said diorite rock, connecting old workings of Cleveland Iron Mining Co., north of the lake with the disputed territory on the south side of the lake, 640 feet, at $15 a foot	9,600.00
Drilling 5 diamond drill holes from surface from the property of The Pittsburgh & Lake Angeline Iron Co., above stated	2,112.00
Drilling 5 lateral holes from the Lake An-	

geline property below ground, as stated above	3,438.00
10 per cent of total cost of pumping lake and all other expenses connected therewith, as stated above	7,648.83
Total cost of equipment of the south deposit according to statement of cashier of The Cleveland Iron Mining Company	25,000.00
	$50,708.83

Now, bringing forward the total profit for 1895 and 1896, as previously estimated	$156,600.00
Deduct above debit	50,708.83
Balance of profit over and above all expenditure	$105.891.17

It will be noticed that at least three-fourths of this $25,000 cost of equipment charged against the profits above consists of personal property removable to any other portion of this or the other mine of The Cleveland Iron Mining Company and can be readily removed to the mine on the north side of the lake belonging to The Cleveland Iron Mining Company through the drift in the diorite rock; and it should not be charged here against these profits, at least not over one-half of it, in arriving at the true equities of the matter. But allowing it to stand as one of the charges as above figured, we find a balance of over $100,000 clear profit, to The Cleveland Iron Mining Company in the two years 1895 and 1896 from the mining of this ore from the land of the complainant, mined without any title to the property or right to do so, but under a mutual mistake of the parties as to their rights.

Courts frequently balance equities in this way. An instance is found in the case of Allore v. Jewell, 94 U.

S. 506, 512. In that case, Allore, as heir of Miss Thibault, filed a bill to cancel a conveyance by her to Mr. Jewell, formerly postmaster general. The defendant Jewell had been in possession for about six years and he had placed improvements on the property to the value of about $7,000. On canceling contract, he would owe rent to the complainant, grantor's heir, for six years, and would have a claim against the grantor's heir to recover back the amount of consideration money paid to the grantor. That is to say, that the complainant had a claim for rent as well as for the surrender of the land. The defendant had a claim for the consideration money and the value of the improvements. There was nothing whatever in the pleadings upon the subject of terms of the decree. What did the court do? It simply balanced the rent for years, and consideration money against the value of the improvements, doing this with the consent of the complainant, and made decree upon this, lumping equities so to speak, without ordering any further hearing. There was nothing in the pleadings on the subject. There was nothing but the oral consent of the *complainant in open court to this course.*

It cannot be said, that the fixing of the terms upon granting the decree, is in any respect making a new contract between the parties for pumping. What was that agreement—not in any way an agreement to convey title or give possession, or anything else except for drainage? Now, the expense of drainage was apportioned to the three parties according to the land to be protected. This court finding that there was an error, in regard to the *area* of the land of the appellant to be protected; and finding that complainant owned an increased area as above indicated, is not making a new contract. The contract was simply for drainage

of the land, the expense to be apportioned as we have said—a mistake in the contract could be corrected by a change in the expense in proportion to the area of land owned by each. It does not in any way touch the matter of contract. The pumping is to be continued until the ore claimed by the complainant is *exhausted*. If it appears by the finding of the court that the ore of complainant extends to a larger area than supposed when contract was made, by reason of a *mistake* of all parties, then it is not a new contract, if the court determines by decree the rights of each.

Thus, in balancing equities of every name and character, a large profit will remain to The Cleveland Iron Mining Company by consent of the complainant, when consenting that the balance of ore taken out prior to the notice to defendants that they had no title to the property to be retained—a consent similar to that made in Allore v. Jewell, 95 U. S. 511, above referred to. In that case, Justice Field considering the question of balancing equities, used the following language: "The "*improvements made have not cost more than the amount* "*which a reasonable rent of the property would have* "*produced;* and the complainant, as we understand, "does not object to allowing the defendant credit for "them. And as to the small amount paid on the exe- "cution of the conveyance, it is sufficient to observe "that the complainant received from the administrator "of the deceased's estate only $113.42. There is no ev- "idence that he ever knew that this sum constituted a "portion of the money obtained from the defendant. "A decree must, therefore, be entered for cancellation "of the deed of the deceased, and a surrender of the "property to complainant, but *without an accounting* "*for back rents, the improvements being taken as an* "*equivalent for them.*"

VIII.

Equities of The Lake Superior Iron Company.

The Lake Superior Iron Company has received no income from the territory in dispute. That territory amounts to about 15 acres, as shown by the testimony of engineer Bradt (see p. 36 of Record), and as marked upon the map, complainant's Exhibit "F". (Page 40 of Record.) The total acreage in the lake belonging to The Lake Superior Iron Co., as shown by that map is 35.20 acres, and in dispute 14.92 acres. So that it has in the pumping apportionment about one-third more than its share; and this amount should be credited back, together with interest thereon.

It has paid $19,540.27, as shown by the statement of the account of Mr. Youngbluth, and also by the statement of Mr. C. H. Hall, General Manager of The Lake Superior Iron Co. One-third of that amount is $6,446.75. (See pp. 137-138 of Record.) The complainant should refund to The Lake Superior Iron Co. the cost of twelve drill holes which it sunk upon the disputed territory under the mistaken idea that it owned that land, and under the acquiescence of the complainant under the same mistaken idea. The cost of these drill holes amount to $4,794.08. (See pp. 141-142 of Record.) Interest should also be allowed upon this expenditure.

It appears from the evidence that for twenty-five years the complainant was in the actual occupation of this now disputed territory, by filling in about five acres north of the south line of section 10, and erecting valuable buildings and other appliances connected with its mine upon the shore of the lake, costing about

$5,000, as shown by the evidence of Mr. Kidder, quoted above.

On account of the erroneous decision of Clute v. Fisher, 65 Mich., Mr. Kidder moved two of the more valuable buildings over the line, to avoid danger of losing them under that decision. But continued in possession of this territory, with its other buildings, occupying the land up to the present time.

It appears from the testimony of Mr. Hall, the agent of that defendant, that no work was done upon this territory except drilling the holes. He testified as to the mining operations of his company on the north side and under the lake on their own territory; that they commenced pumping out the lake in 1893. That the expense of this pumping was substantially as stated by Mr. Youngbluth, the accountant of The Cleveland Iron Mining Co., to which we have referred. He also stated that his company drilled twenty-four holes, and within the limits of the bed of the lake. Twelve of them were inside of the dotted lines of the disputed territory. (See pp. 139-141 of Record.) He also testified as to what was found by the diamond drill holes.

The general manager of The Lake Superior Iron Company, C. H. Hall, examined by their counsel, Mr. Ball, testified as follows:

Q. Can you tell us in the first place about the expense of the opening of that body of ore altogether; the expense of sinking the shaft and running the drift and opening up the body of ore (the opening up of the body of ore owned by defendant on the north side of the lake)? A. I am not so sure; I can't separate this particular body of ore. From Nov. 1, 1895, to May 1, 1896, which dates back a little further than what time we stated, we commenced driving that drift.

The total expense up to January 1, 1897, has been $149,111.44.

Mr. Ball—Has that been principally in preparatory work for mining? A. That has been preparatory work in mining. It is not all in this deposit entirely.

Mr. Ball—Can you tell about the—approximately—expense of opening up that deposit ready for mining as you have it now? A. The greater portion, nine-tenths of these figures I give you have been expended there.

Q. Well, that would be sufficient. Does that include the drill holes that you made in exploratory work? A. It includes everything.

Q. Can you state the *cost* of these *drill holes* themselves that you have sunk on the land within the property *that is claimed by the Lake Angeline according to that mark?* A. *Yes, I can give the figures, I think. The total cost of diamond drilling exploration has been $8,784.99. I don't mean this is all inside of this pencil line.*

Court—Can you give each one separately, and they can be footed up then?

A. I can give them by numbers.

No. 1 cost	$481.27
No. 2	359.63
No. 3	506.61
No. 13	331.63
No. 15	335.80
No. 16	300.67
No. 18	311.66
No. 19	384.86
No. 20	373.41
No. 22	374.33
No. 23	333.72
No. 24	506.49

Q. Will you state whether these *holes* that were drilled over south of that imaginary line *within the territory claimed by the Pittsburgh & Lake Angeline Iron Co. exposed any considerable quantity of ore?* A. *They didn't in my opinion.* I have not the figures, except my memory; but one hole showed about 30 feet of ore in it. That is No. 13. No. 16 had about 20 or 25 feet. No. 15 had just a very small amount, I don't remember; it had simply ore. No. 3 had about 90 feet of ore vertical, good ore.

Q. Do you know whether or not prior to the time this suit was commenced the complainant or officers of the Pittsburgh & Lake Angeline Co. were aware of the discoveries of ore you had made there? A. *They were not aware of it at all,* and I heard the superintendent of the Pittsburgh & Lake Angeline mine say that he had a map showing the drill holes in the lake bottom. That was inside of a month (see pp. 141 and 142 of Record).

It thus appears, that in the sinking of a mining shaft on the north side of the lake, and work by The Lake Superior Iron Co. on its own territory north of the territory claimed by the Pittsburgh & Lake Angeline Co., they spent considerable money in opening up their mine under the north part of the lake. That they did this in the winter of 1895 and 1896, and following years. That in drilling over the line into the Pittsburgh & Lake Angeline territory they found some ore; but as Mr. Hall says in his testimony, in his opinion it didn't expose any considerable quantity of ore. As we have said above, it was well known for many years prior to that time that the deposits of ore upon the shores of the lake, both to the north and south, were dipping under the lake before these drill holes were put down, and that is why all three companies entered into an agreement to pump out the lake.

The clause in the pumping contract upon which the defennants rely for an estoppel appears upon pages 90 and 91 of the Record and is as follows: "To erect and "maintain proper and sufficient flume so constructed "above the present water level of Lake Angeline so as "to divert and carry away all surface water or other "surface drainage which would otherwise come into "the present bed of said lake from off the land lying "above the present water level of said lake and south "of the south line of section 10, as projected through "said lake; and also to run into said flume any and all "water which the said third party may pump from its "mine or mines, which said flume said third party agrees "to maintain and keep in good repair and in successful "operation, diverting such drainage from the bed of said "lake *until all the ore to which said third party is entitled* "(lying in and under the portion of the bed of said "lake lying south of the south line of section 10), *is* "*mined and exhausted, and then to turn over said flume* "*in good repair to said first and second parties hereto* "*without charge, and to allow them thereafter to operate* "*and maintain the same for the purpose of continuing* "*said drainage, giving the employes of said first and* "*second parties free access in and to said flume, for the* "*purpose of maintaining and operating the same,*" etc.

Without doubt there was an honest, mutual *mistake* between the parties as to the boundary line of ownership at the time the pumping contract was made; and if we put in brackets the mistaken clause of the above quoted portion of the contract, it would appear in the contract as follows: "which said flume said third par- "ty agrees to maintain and keep in repair and in suc- "cessful operation, diverting such drainage from the "bed of said lake until all iron ore to which third par- "ty is entitled is mined and exhausted, and then to

"turn over said flume in good repair to first and second "party hereto without charge", etc.

We submit that the controlling intent of this paragraph of the contract is, that the complainant shall maintain said flume *"until the iron ore to which said third party is entitled is mined and exhausted"*; whether the boundary be the south line of 10 or the center of the lake or any other point. That the words within the *brackets* are simply a statement thrown in as to *what was then understood* to be the boundary of ownership between the parties; but the paramount and controlling provision was that *so long as the complainant had ore belonging to it under the bed of said lake to be mined, and which had not been exhausted*, so long the complainant was to maintain that flume. We insist that the *erroneous* statement within the brackets above was a *mutual mistake, and is not a controlling clause that will affect that contract in any way as to its permanency if stricken out as a mistake. It forms no part of the consideration. It conveys nothing.* The paramount obligation of both parties to the contract is *to pump* the lake and *keep it pumped*, and to *maintain the flume* in condition for drainage *until the ore is exhausted*, leaving out the material clause in the brackets; simply prolonging the time in which the complainant must under its contract maintain the flume.

The defendants insist that they have a right to the disputed territory, because the words in the brackets above referred to appear in the pumping contract, and that the complainant is estopped from asserting its legal ownership; notwithstanding it is in conflict with the Statute of Frauds, and in conflict with the statute for the protection of stockholders. To maintain such a theory would not only be in violation of the Statutes of Michigan but unconscionable, because it would

maintain that a mutual *mistake* of ownership can be used to build up an equitable estoppel against the legal title *without fraud or irreparable injury.* And to assert that the legal title to valuable real estate can be taken away by mistake, *when the only party who has suffered by the mistake is the complainant.* This is beyond question, as the complainant offers to refund to the defendant The Lake Superior Iron Company, all its expenditures upon the disputed territory for work. It appears, as we have pointed out, that The Cleveland Iron Mining Company in the year 1895 and 1896, cleared over $100,000 over and above all expenditures on disputed territory, and that if compelled at that time to turn over the disputed territory to complainant; if allowed to retain the ore taken at that time, it would be a large gainer. There is no merit in the claim of either defendants. If the prayer of complainant is granted, they will simply deliver up what they *never owned*, and have no legal or equitable right to, The Cleveland Iron Mining Company having reaped a rich reward by the mistake, and the defendant The Lake Superior Iron Company will suffer nothing thereby when refunded the amount expended upon the territory with interest to date.

IX.

The Claim of The Cleveland Iron Mining Company.

Counsel for The Cleveland Iron Mining Company claim, that if the rule of apportionment to the center of the lake as invoked by complainant is adopted, it would be entitled to a small portion of the arm of the

lake lying south of the south line of section 10, on lot 3 of section 15; and that its right would extend to the center of this arm of the lake marked on complainant's Exhibit F, as 12.50 acres; its share as shown in its map amounting to somewhere in the neighborhood of an acre and a half to two acres as they claim it; and where the evidence shows the complainant has already mined to some extent. And this defendant insists, that it will be impossible to make a proper apportionment on that account, because of that mining.

There is no force in this position, for two reasons:

First—There was offered in evidence the maps of the under ground workings of The Pittsburgh & Lake Angeline Iron Company, at the request of defendant's counsel, showing the drifts and stopes in which ore was mined; the witness Bradt, the engineer in charge of the mining, testifying as to the number of levels and the size of the drifts, etc., from which an estimate of the amount of ore taken out could be made (see pp. .....of Record), or on an order for an accounting, more specific proof could be made by both parties as to ore mined.

Second—It fully appears that a much larger amount of ore was taken out by The Cleveland Iron Mining Company from the territory north of the lake owned by complainant, and one being offset as against the other, and the expense of one against the expense of the other, under the evidence, the loss would be much largely against the complainant, and in favor of The Cleveland Iron Mining Company.

So there is no force in that claim.

Chief Justice Grant, in delivering the opinion of the lower court, seemed to hold this an obstacle. At the bottom of page 256 of the Record, the learned judge, referring to that territory, said: "Complainant *has no*

"*means of ascertaining how much ore was taken from* "*this territory*, part of which, under its theory, belongs "to The Cleveland Iron Mining Company. Part of the "territory has caved in and the rest is filled with "waste rock."

As we have just said, the knowledge of the number of levels, accurate maps of the workings, sizes of the drifts, and the account of ore taken out of all such mining operations accurately kept from day to day, furnishes a very close information as to the amount. And upon this court determining, that the complainant is the owner of this property, and should be reinstated in its possession, according to a proper apportionment; the case can be referred to a master to take the testimony as to all such matters, to be reported to the court for final decree. Though, as we have said, The Cleveland Iron Mining Co. having taken so much larger quantity of ore from complainant's territory, and before it was notified that it had no right to mine there; and as the complainant is willing that it should retain the ore taken before said notice, viz: in 1895 and 1896 an offset against anything taken by it south of the line, if The Cleveland Iron Mining Co. should be entitled to any of that territory south of the line (of which there is doubt) there really would be no necessity for any such reference. But, if the court thought otherwise, it could be had.

Chief Justice Grant criticises somewhat our mode of partitioning (see page 257 of the Record). All we would say as those criticisms is that there is, as suggested by the learned judge, a difficulty in apportioning any inland lake of irregular form; but they are apportioned according to the conditions which each present, as he holds in his opinion, and that if the method which we suggest in our bill of complaint

and maps are not in exact accord with what this court thinks should be the mode of partitioning, of course it is the province of the court to apportion as in its best judgment would be most accurate and equitable.

On page 259 of the Record referring to the opinion of the court below, it is said that "The result of com-"plainant's contention would be that whenever any "case has been *overruled*, every principle or agreement "based upon that decision may be set aside by the "courts, if not barred by the Statute of Limitations. "The agreements and settlements of parties made with "full knowledge of the facts in reliance upon the law, "should be as binding as the judgment of the court in "a particular case. If ten other similar suits had "been pending when Clute v. Fisher was decided, and "judgment had been rendered in reliance upon that "decision, the courts could not now set them aside."

Our claim is, that on account of the decision of Clute v. Fisher, the complainant was not guilty of acquiescence because not insisting upon its ownership of the land in dispute, as it had done for twenty years; and when that opinion was overruled, the complainant having been compelled by the law as established in that case not to resist the defendants in their assertions of ownership. Supposing that to be so, when that case was overruled the complainant, whether mistaken or not, should be placed just where it was when Clute v. Fisher was decided on its application as to its title and equitable rights, at least voluntary acquiescence in such possession should not be imputed to it. It would be unjust to say that Mr. Kidder or the complainant should have known more about the law than the supreme court itself, and that complainant was guilty of acquiescence and surrender of rights under those circumstances. Such a position would shock

the sense of justice of any fair minded man. Clute v. Fisher explains fully why during the years 1887 up to 1896 Mr. Kidder made no resistance until after he heard of the decision of Ice and Coal Co. v. Ice and Coal Co., 102 Mich., overruling the former decision; and why, in making the pumping contract, he did unite with the defendants in arriving at the amount to be paid for pumping under the supposition that the territory north of the south line of 10 had been lost by the complainant, under the decision of Clute v. Fisher, 65 Mich. It simply explains his action in the matter that he was acting in good faith, intending to obey the law and keep the peace, and that is all that is necessary in this case. He says that in making the contract for pumping the lake, there was no thought or suggestion on his part of fixing any boundary or title to land, as he at that time supposed that his company was foreclosed of their rights by Clute v. Fisher.

We submit there is no force in the claim of complainant, that the court must treat the pumping contract as an intentional division of the territory and an apportionment of the same; and that the court cannot *reform* this contract, as to the *amount* to be paid for this pumping, notwithstanding the clear *mistake* of all parties as to the legal title to the territory covered and as to the amount each should pay for pumping. That the lake must be left to fill up, if any of the parties refuse to allow a reformation of the contract, is absurd. It is one of the plainest duties of a court of equity, not to make contracts, but to reform them, according to the rights and intentions of the parties. This can clearly be done in this case, as to this pumping contract.

As we have said above, the controlling intent of the parties, as shown in the paragraph of the pumping

contract relied upon by defendants (page 90 of Record), is that the complainant shall maintain a flume *until* the iron ore to which said third party (the complainant) *is entitled, is exhausted;* and that the statement within the brackets, viz.: "lying on, in or under the "portion of the bed of said lake lying south of said "south line of section 10", is simply a statement thrown into the contract as to *what was then understood to be the boundary of ownership* between the parties; but the *paramount* and *controlling provision* of the contract is, *that so long as the complainant has ore belonging to it,* under the bed of said lake, *to be mined,* and which has *not been exhausted, so long the complainant must maintain that flume;* and that *when* its ore becomes *exhausted,* then that it *shall permit the defendants* to *maintain the flume upon its territory so long as they shall desire.* We submit that there is no force in the claim of defendant's counsel, either that the pumping contract is in any sense a conveyance of rights, or that it cannot, if reformed, protect the rights of all.

X.

Estoppel not Applicable to this Case.

"The doctrine of estoppel can have no application "where everything was equally known to both parties, "or the party sought to be estopped was ignorant of "the fact, out of which his right springs."

Fletcher v. Holmes, 25 Ind. 458.
Long v. Anderson, 62 Mich. 537.
M. & H. Turnpike Co. v. Sidener, 40 Ind. 424.
Anderson v. Hubbel, 93 Ind. 578.

"The answers do not allege that the defendants were "ignorant of the facts upon which they seek to build "an equitable estoppel. And in order to assert such "claim and make such proof there must be pleading "alleging such claim."

Bigelow on Estoppel, 5th Ed. 709.
Lash v. Randall, 72 Ind. 480.
Robbins v. McGee, 76 Ind. 390.
Wood v. Ostram, 29 Ind. 177.
Terrill v. Grinnell, 20 Iowa 393.

Bigelow on Estoppel, 5th Edition, 709, states the rule as follows: "A plea of estoppel *in pais* by misrepresentation should ordinarily show:

"First—That the party sought to be estopped, has made a representation with the intention of influencing the conduct of the pleader in a manner inconsistent with the claim set up.

"Second—That the misrepresentation was known by the party making it to be false, and that the pleader did not know that it was false, but on the contrary believed it to be true.

"Third—That the pleader has acted upon such act or declaration.

"Fourth—That he will be prejudiced by allowing the truth of the admission to be disproved."

In the case of Pickard v. Sears, 6 Adolph & Ellis, 259, Lord Denman stated the rule as follows: "The rule of law is clear, that where one by his words or conduct *wilfully causes another to believe the existence of a certain state of things, and induces him to act on that behalf, so as to alter his own previous position*, the former is concluded from averring against the latter a different state of things, as existing at the same time."

This has been a leading case as to equitable estoppel and points out *that the party asserting the estoppel must*

have been induced by the party against whom the estoppel is sought, with wilful intent to defraud, to act *different* from what he otherwise would have done. No such wilful intent exists in this case. In fact all of the parties acted under mutual *mistake, each having knowledge of the facts.*

In the case of Brewer v. Boston & Worcester R. R. Corp., 5 Metcf. 478, the court held as follows: "A and B, owners of *adjoining land,* intending to establish the divisional line, according to the true boundary, *agreed by parol,* on a line that did not conform to such boundary; and afterwards held possession according to such conventional line. B sold his land to C. Before the sale A stated to C that the land which he (A) claimed was bounded by said conventional line between himself and B, and *that he did not claim beyond that line.* After the sale to C *he made improvements* on the land next to such conventional line, *with the knowledge of A,* who was often present, and pointed out said line *without expressing any dissent to C's* proceedings, or giving notice that he had any claim to said land; and afterwards A discovered that said conventional line was not the true dividing line, and that C was in possession, as B had been, of a piece of land, which according to the true line belonged to A; and he therefore brought a writ of entry against C, to recover between the true line and said conventional line. Held, that A *was not estopped to claim this land of C as he had acted under a mere mistake, without fraud or gross negligence.*"

The learned judge, discussing the case, used the following language: "It is also agreed that the parties to the said parol agreement acted under *the belief* that their respective flats were in the direction and in conformity to the line agreed upon. We must, therefore,

consider the declarations and admissions as having been *made in good faith and by mere mistake;* and admissions thus made do not, we think, by law operate by way of an estoppel. This kind of estoppel was first established by courts of equity, and has since, to a certain extent, been adopted by courts of law. *It is founded on fraud or gross negligence amounting to fraud.* First Story on Eq. 386, 391. The doctrine, we think, is correctly laid down by Nelson, Judge, in Welland Canal v. Hathway, 8 Wend. 483. "As a general rule", he says, "A party will be precluded from denying his own acts or admissions, *which were expressly designed to influence the conduct of another, and did so influence it;* and when such denial will operate to the injury of the latter, and where in good conscience and honest dealing he ought not to be permitted to gainsay them. The same doctrine substantially is laid down in Pickard v. Sears, 6 Adolph & Ellis, 474."

In the same case the learned judge used the following language: "We do not, however, decide the case on these considerations, but on the ground that the demandant has acted fairly under a mistake, and that he has made no declaration contrary to his honest belief at the time or with any intention to deceive the tenants, and we think it clear the declarations thus made do not operate in the nature of an estoppel. A party is *not estopped to prove a legal title to his estate by any misrepresentation of its locality made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot,* the title to which may prove defective. For, he may require a warranty, and *it would be most unjust that a party should forfeit his estate by a mere mistake.*"

In the case of Tolman v. Sparhawk, et al, 5 Metcf. 476, the court held as follows: "That a parol agree-

ment *not in writing* is valid so as to pass title to land *cannot be maintained under any circumstance.* It may justify the occupation of lands by the respective parties in pursuance of the agreement; and by such an occupation under a claim of right, if long enough continued, a legal title may be acquired (by the expiration of the Statute of Limitations); and such an agreement and occupation under it, though not continued twenty years, may, perhaps, under certain circumstances, operate as an estoppel, according to some of the decisions in the New York cases. Under what circumstances such an agreement would be held to operate in that state, by way of estoppel, seems to be left doubtful by the decisions of the court of appeals in Adams v. Rockwell, 16 Wend. 285. But however this may be, we are well satisfied that on principles of law, established, it *cannot so operate where the agreement to establish an erroneous line is founded on a mistake*, the parties supposing the line agreed upon to be the true boundary; nor, unless the occupants shall have made improvements upon the premises between the true and erroneous lines, *exceeding in value the value of the land without such improvements; nor, even then, if the occupant making the improvements may be entitled to recover from the owner of the land the value of the improvements.* To hold that under such circumstances a party might be *prevented from asserting* his title to his land by the doctrine of estoppel, would be an *invasion of the statute of frauds and against manifest justice.*"

So, in the case at bar, to deprive the complainant of its legal title to a large and valuable iron ore deposit and iron ore territory, in area about thirty acres, *by way of estoppel*, when complainant offers to refund to The Lake Superior Iron Company any expense incurred

in diamond drilling, or any other expense incurred; and when it conclusively appears that the defendant The Cleveland Iron Mining Company, has reaped a profit in excess of all its expenditures from the removal of ore from the property, amounting to about $100,000, over and above such expenditures, very much exceeding any amount taken by complainant from a small territory referred to that might possibly have belonged to The Cleveland Iron Mining Company under the rule of partition invoked by complainant: and when complainant says to that defendant, you can retain these large profits up to the time that you were notified that you were upon our property, up to the time that this *mutual mistake was discovered.* Under such a condition there was no fraud or deceit or inducement by complainant — nothing on which to build an estoppel; when the court determines, that the legal title is and always has been in complainant, or there has been no fraud of any kind on the part of complainant in the matter, and that what the defendants have done upon the land has been acquiesced in by complainant through mutual *mistake*, under which defendants have reaped a profit and no loss, (that is, The Cleveland Iron Mining Company) and the defendant The Lake Superior Iron Company, is offered a return of all expenditure: there is neither legal or equitable reason why the defendant should be *allowed to retain real estate to which they have no title.*

In the case of Proctor v. Putnam Machine Co., 138 Mass. 159, 162, the Massachusetts court affirmed its long line of former decisions in regard to equitable estoppel, and held as follows: "Neither lands nor any interest therein, are to be conveyed by mere oral agreements, and the declaration or admissions of a demandant, made in good faith, and *by mere mistake, cannot*

estop him from proving the legal title to his estate, even if, but for such admissions or declarations, the tenant might not have incurred the expenditures which he has made. Tolman v. Sparhawk, 5 Metcf. 469. Brewer v. Boston & Worcester R. R. 5 Metc. 478. Liverpool Wharf v. Prescott, 7 Allen 494."

This court held in the case of Brandt v. Virginia Coal and Iron Co., 3 Otto 326, 337, in the language of Justice Field, as follows: "It is difficult to see where "the doctrine of equitable estoppel comes in here. For "the application of that doctrine, there must generally "*be some intended deception* in the conduct or declara- "tions of the party to be estopped, or such gross negli- "gence on his part as to amount to constructive fraud, "by which another has been misled to his injury. '*In "all this class of cases*,' says Story, 'the doctrine pro- "ceeds upon the *ground* of constructive *fraud* or *gross "negligence*, which in effect implies fraud; and there- "fore, when the circumstances of the case repel any "such inference, although there may be some degree "of negligence, yet courts of equity will not grant re- "lief. It has been accordingly laid down by a very "learned judge, that the cases on this subject go to "this result only, and that there *must be positive fraud "or concealment, or negligence so gross as to amount to "constructive fraud*.' First Story's Eq. 391. To the "same purport is the language of the adjudged cases. "Thus it is said in the supreme court of Pennsylvania "that the primary ground of the doctrine is, that it "would be a fraud in a party to assert what his pre- "vious conduct had denied, when on the faith of that "denial, others have acted. *The element of fraud is "essential*, either in the intention of the party estop- "ped, or in the effect of the evidence which he at- "tempts to set up."

Hill v. Epley, 31 Pa. St. 334.
Henshaw v. Bissell, 18 Wall. 271.
Biddle v. Boggs Mining Co., 14 Calif. 368.
Davis v. Davis. 26 Calif. 23.
Com. v. Moltz, 10 Peters 331.
Copeland v. Copeland, 28 Me. 538.
Delaplaine v. Hitchcock, 6 Hill. 616.
Hawes v. Merchant, 1st Curt. C. C. 136.
Zuchtman v. Roberts, 109 Mass. 53.

In the case of Steel et al. v. St. Louis Smelting and Refining Co., 106 U. S. (book 27 co. op. ed. p. 226) Justice Field, delivering the opinion of the court, held: "The principle that one should be estopped from as- "serting a right to property upon which he has by his "conduct misled another, who supposed himself to be "the owner, to make expenditures, *cannot be invoked* "*by one who, at the time the improvements were made, was* "*acquainted with the true character of his own title, or* "*with the fact that he had none.*"

Citing, Brandt v. Virginia Coal & Iron Co. 93 U. S. 327.
Henshaw v. Bissell, 18 Wall 271.

In the case of Henshaw v. Bissell, 18 Wall. 271, 272, the court held as follows: "Both claimant and surveyor seemed to have acted on the supposition, that the erroneously designated parallels of latitude should govern the location, instead of the natural boundaries indicated on the map. There does not appear to have been any intention, on the part of Larkin, to mislead anyone as to the nature of his rights. He was satisfied to keep the land originally selected by him; and he contended, and those who succeeded to his interests contended, for the correctness of his selection; but the government, through its appropriate officers, interfered, and asserted that another and different location was required by the grant. There is, there-

fore, *no case for the application of the doctrine of equitable estoppel. For its application there must be some intended deception, in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud.* An estoppel *in pais* is sometimes said to be a *moral* question. Certain it is, that to the enforcement of an estoppel of this character *such* as *will prevent a party from asserting his legal rights to property*, there must generally be some degree of turpitude in his conduct, which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights, have no such ingredient, and seldom work any such result." Citing

Brewer v. R. R. Co., 5 Metcf. 479.
Boggs v. Mercier Mining Co., 14 Calif. 368.
Whitaker v. Williams, 20 Conn. 105.

In the case of Kingman v. Graham et al., 51 Wis. 245, the court used the following language: "It must be remembered that the defendant undertakes to estop the plaintiff setting up a title to real estate by matter in pais, which title appeared of record, in the office of the register of deeds of the proper county, at the time the matter in pais which is set up as an estoppel occurred, and had been so upon record for two years previous thereto.

In Brandt v. Virginia Coal & Iron Co., 93 U. S. 326, the supreme court of the United States used the following language: Here the court quotes the language of Justice Field quite at length, which we have quoted above, and continues: "This court has adopted the foregoing rule as to estoppel in pais substantially in Norton v. Kearney, 10 Wis. 443-445; Vilas v. Mason, 25 Wis. 323; McLean v. Dow, 42 Wis. 610. Under this rule, we do not find any evidence in the record which brings the plaintiff within it. He took all proper pre-

cautions to give notice of his title to all the world, by putting his title upon record in the proper office * * * It is also essential for its application, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge. When the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." Citing

Knouff v. Thompson, 16 Pa. St., 357, 364.
Crest v. Jack, 3 Watt, 240.
Hepburn v. McDowell, 17 S. & R. 383.
Markham v. O'Connor, 52 Ga. 183.

In the case of Brothers et al v. The Bank of Kaukauna, 84 Wis. 381, 397, the court held as follows: "In order that such an estoppel shall exist, there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to positive fraud, by which another has been misled to his injury."

Citing cases referred to above.

And in the case of Betman v. Harness, 26 S. E. Rep. 272, 277, the court held as follows: "It is of the essence of estoppel by conduct where one alleges that the conduct of another has misled and betrayed him, that the former should be inspiring false belief and confidence in that other, and it cannot, where that other's eyes are open to the true state of things, and he knows the truth about the things as to which he alleges he was misled, and knows the other man did not intend to inspire false confidence." Citing

Bigelow on Estoppel, 262.

Bates v. Swagger, 40 W. Va. 420; 21 S. E. Rep. 874.
Mason v. Bridge Co., 28 W. Va. 639, 649.
Graham v. Thompson (Ark.) 18 S. W. Rep. 58.

From a review of the authorities cited, we think it clear that the evidence presents no ground for the application of estoppel to defeat the legal title of complainant. There was no fraud upon the part of complainant in the case. Its entire action was *against its own interest* and controlled, as conclusively appears, by the decision of Clute v. Fisher, 65 Mich. 48. Whether the complainant should have submitted to the law as laid down in Clute v. Fisher, without resistance and litigation, is a question of judgment and policy whether it should have done or not. But it conclusively shows an honest purpose to keep the law as there stated. Subsequently the law as laid down in Clute v. Fisher was overruled in Ice & Coal Co. v. Ice & Coal Co., 102 Mich. Clute v. Fisher was the cause of the complainant's temporary non-resistance of the claim of defendants to the land in question and making the pumping contract, in which the supposed relative ownership of the surface, determined the *amount* that each should pay for pumping the lake, and the establishment of a permanent drainage by the erection of a flume for the discharge of the water. This flume run the full length of the lake on the south and was built by the complainant at a cost of $6,000 and by the contract to be maintained by it as long as it had ore to be mined there. Also granting to the defendants the right to use and maintain the flume so long as they should have ore to mine within the territory in question (see pp. 90 and 91 of Record).

We submit that it is clear from the review of this case,

First. That the complainant acquired, through the patent from the government, the legal title to the property in question, and now owns the same.

Second—That under the pleadings and proofs and opinion of the supreme court of Michigan, a federal question is involved, and is the basis of all determinations by that court.

Third—That there can be no estoppel by contract in this case depriving complainant, a mining corporation, of a portion of its mining territory without authority of three-fifths in interest of the entire stock of the company granted at a stockholders' meeting called for that purpose.

Fourth—Under the statutes and decisions of Michigan, title to realty cannot be transferred by estoppel *in pais;* the question involved is not the settling of a boundary line, but one of transfer of title of about thirty acres of mining territory, of triangular form derived through patent from the United States government.

Fifth—That the holding of the disputed territory by the defendants since 1895, when Cleveland Iron Mining Co. commenced work on it, has been by mutual *mistake* of rights, without fraud on the part of any of the parties.

Sixth—That the defendant, The Cleveland Iron Mining Co., by surrendering the property to complainant will suffer no loss; but reap a rich harvest from the mutual *mistakes*, if allowed to retain the iron ore mined by it upon the property in question prior to October 29, 1896, when notified by complainant that it was trespassing upon its rights.

Seventh—That the defendant, The Lake Superior Iron Co., will suffer no loss if it is repaid by complainant the amount it expended in diamond drill explora-

tions upon the property in dispute, and interest and all other expenses in connection therewith, which the complainant here offers to repay; and that the decree in its favor be conditioned upon doing so.

We respectfully submit that this court should partition the lake territory between the defendants and the complainant in the manner asked for or in such other way as shall appear to the court most in accordance with law and equity.

Respectfully submitted,

F. O. CLARK,
Solicitor for Complainant.

ALFRED RUSSELL,
Of Counsel.

No. 260.

Brf. of Russell for P. C.

Office Supreme Court U. S.
FILED
FEB 19 1900
JAMES H. MCKENNEY,
Clerk.

Filed Feb. 19, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 260.

THE PITTSBURGH & LAKE ANGELINE IRON CO.,
Plaintiff in Error,

vs.

THE CLEVELAND IRON MINING CO. and
THE LAKE SUPERIOR IRON CO.,
Defendants in Error.

ERROR TO THE SUPREME COURT OF MICHIGAN.

IN EQUITY.

Separate Brief for Plaintiff in Error.

ALFRED RUSSELL, OF COUNSEL, DETROIT, MICH.

Eby & Matthews, Printers, Detroit, Mich.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 260.

THE PITTSBURGH & LAKE ANGELINE IRON CO.,
Plaintiff in Error,
vs.
THE CLEVELAND IRON MINING CO. and
THE LAKE SUPERIOR IRON CO.,
Defendants in Error.

Error to the Supreme Court of Michigan.
In Equity.

Separate Brief for Plaintiff in Error,

ALFRED RUSSELL, OF COUNSEL, DETROIT, MICH.

1. This is a bill in equity, filed in the Circuit Court for the County of Marquette, Michigan. That court made a decree dismissing the bill, which decree was affirmed by the Supreme Court of Michigan.

2. The object of the bill is to determine titles under federal grants of land bordering on an inland lake in Northern Michigan, and to obtain a decree making an equitable division of the lake bed. The lake has been drained by the parties in order to reach extremely valuable ore underneath. The appellant and the two appellees own all the land around the lake by grants from the general government.

3. It would seem self-evident that a Federal Court has jurisdiction (if the question is properly presented) to construe a federal grant, as a case arising under the laws of the United States. I so advised when the case was first presented to me by Mr. Clark, by correspondence. A case in equity, says Chief Justice

Marshall, arises under the laws of the United States, and under the twenty-fifth section of the Judiciary Act, when a correct decision depends upon a construction of the grant.

Cohens vs. Virginia, 6 Wheat., 264, 379.

"The case arises emphatically. The Act of Congress is its foundation. The contract would never have been made but under the authority of that act."

Osborn vs. U. S. Bank, 9 Wheat., 738, 824.

When it appears that the claim of the plaintiff will be defeated by one construction of United States law, or sustained by the opposite construction, then the case is one arising under the laws of the United States.

Starin vs. N. Y., 115 U. S., 248, 257.

Federal courts must construe grants of the general government without reference to rules of construction adopted by the states.

Parker vs. Bird, 137 U. S., 661.

Questions of title to land derived from the United States are to be determined by the construction of the laws of the United States.

Wilcox vs. Jackson, 13 Pet., 517.
Wis. Cent. R. Co. vs. Wis. P. Land Co., 71 Wis., 99.

If, then, the federal question is presented by the pleadings, and was passed on, adversely to the plaintiff in error, by the court below, this court has jurisdiction to review.

4. The pleadings in the case at bar exhibit the federal question plainly. Paragraph V. of the bill sets out the title of the plaintiff in error from the United States.

Record, p. 5, pp. 30 to 33, Patents.

Paragraph VII. of the bill, also, very fully alleges ownership of the land, under the water, by virtue of the United States patent.

Record, pp. 10, 11; Map Ex. A to bill.
Ex. F of Plaintiff's evidence, pp. 40, 41 of Record.

The defendant, Lake Superior Iron Company, in paragraphs 6 and 7 of its answer, denies that the complainant (plaintiff in error), is the owner of the land to the center of the lake, or is entitled to any such portion of its bed as it claims, or is the owner of any portion of the bed of said lake in Section 10.

The answer of the Cleveland Iron Mining Company, paragraph 4, sets out the construction of the grant which is claimed by said company very fully.

Record, p. 23.

Accordingly, beyond controversy, the following federal question is presented on the pleadings. Whether the plaintiff in error owns the submerged land to the center of the lake (about 36 acres), under its abutting grants from the United States; and whether the defendants own the same submerged land, which would be included if the lines of the defendants' fractional grants from the United States were fully extended into the water.

5. Also, the decision below exhibits the same federal question. The court below passed on the question of the title of plaintiff in error, derived from the United States; and Chief Justice Grant distinctly declares that plaintiff in error has no title to the land claimed by it under the water as appurtenant to the frontage of its grant derived from the United States.

The Chief Justice said: "The Cleveland Iron Mining Company claimed title by virtue of the original patent. Complainant (plaintiff in error) owned no specific piece of land north of the section line, even on its own theory, which could be measured by metes and bounds."

76 N. W., 403, 2d column, below middle.
Record, p. 262, middle.

The court is speaking of the submerged land in dispute, which was north of that line, and denies its ownership by the plaintiff in error.

P. & L. A. Co. vs. L. S. Co., 76 N. W., 395, 403.

Defendants in error do indeed argue that the court below disposed of the case wholly on the ground of estoppel, under the drainage contract between the parties (which will be referred to later); but the contention of the plaintiff in error is, that it was impossible to reach the question of estoppel without passing on the question of title to the submerged land under the United States grants, and that the chief justice of Michigan did distinctly pass upon that question of title, as above shown.

See petition for writ of error, Record, p. 265.

6. The court below held: "Complainant (plaintiff in error) owned no specific piece of the (submerged) land north of the section line." This was the very point in controversy. The whole object of the bill was to make specific that land under the water belonging to the plaintiff—to make it "specific" by determining its boundaries under a finding by a court of equity. But the Court below held, substantially, that, the boundaries of our submerged land being in doubt, we had no title to any submerged land at all.

7. Numerous cases, analogous to the present, and some on all-fours with it, have been decided by this court. I refer to some of those which have been brought here, under the twenty-fifth section, from the highest courts of the states.

In 1868, in the Supreme Court of Minnesota, the question was whether a government grant of land in that state, bounded by the Mississippi, included certain submerged land; and this court exercised jurisdiction to review the decision below, and without objection.

R. R. Co. vs. Schurmeier, 7 Wall., 272.

In 1890, in the Supreme Court of California, the question was whether land, patented by the United States, bordering on the Sacramento river, included an island opposite in the stream; and this court reviewed the case, also without objection to the jurisdiction.

Packer vs. Bird, 137 U. S., 661.

In 1891, in the Supreme Court of California, there was a question whether the land derived from the general government

extended below high water mark on San Francisco Bay. This court took jurisdiction to review, also without objection, and reversed the court below.

Knight vs. U. S. Land Assn., 142 U. S., 161.

In 1893, the Supreme Court of Oregon dealt with a conflict as to title to lands derived from the United States, below high water mark in the Columbia River. The judgment of that court against the validity of the claim of the party appealing to the court went upon the ground that the grant from the United States to him passed no title in lands below high water mark. The appellee contended, in this court, that the question presented here was merely the construction of the grant, and was the same as if the grant had been from a private person and not from the United States. This court held that the Oregon Court had adjudicated directly against a right claimed under a law of the United States, and that this ruling presented a federal question, clearly within the appellate jurisdiction of this court.

Shively vs. Bowlby, 152 U. S., 1.

Upon these authorities the present case is manifestly within the jurisdiction of this court.

8. But the appellees insist that the court below based its decision upon an independent ground, broad enough to maintain the decree dismissing the bill, irrespective of any federal question, namely, estoppel, said to arise from the joint contract of the appellant and appellees concerning the drainage of the lake, which contract is now claimed by appellees not to be a drainage contract pure and simple as appellant contends, but to be an agreement for the division of the lake bed, and therefore operating as an estoppel on appellant.

The appellant argued below that (1) there could be no such thing as conveyance of title by estoppel, under the Michigan decisions and statute of frauds; and (2) that, under the Michigan mining statute, there could be no conveyance of thirty acres of submerged ore land belonging to appellant without a vote of three-fifths in interest of the entire stock of the appellant company at a meeting called for the purpose.

The court below replied to this argument in substance that the Michigan decisions against conveyance of title by estoppel, and also the Michigan statute against conveyance by any less authority than a three-fifths vote, had no application;—for the reason that appellant had no title whatever to the submerged 30 acres (derived from the United States) which could be the subject of conveyance by estoppel or by a three-fifths vote of stockholders.

So that the doctrine of estoppel, as applied by the court below, was based wholly upon the holding of that court that appellant had no ownership whatever of the submerged land by reason of its grant from the general government. The court could not, and did not, reach the question of estoppel except by first deciding the question of title under the federal grant adversely to plaintiff in error.

76 N. W., p. 396, headnote 4; also p 403, 2d column, below middle.

It is thus plainly apparent that the alleged independent ground of estoppel necessarily involved, and rested upon, the decision that the appellant had no title at all to the submerged territory as a part of its ground patented by the United States.

9. The holding of the court below that appellant had no title to the submerged 30 acres appurtenant to the upland bought by its grantors from the general government, was clearly erroneous under the decisions of this court.

By those decisions, appellant owns to the center of the lake. The government sells its lands according to the dry acreage, charging only for that, and running meander lines simply to fix the amount of dry acreage to be paid for, and not for the purpose of limiting title of the grantee by the meander lines as boundary lines.

This court declares that by common law fresh water inland lakes belong to the owners of the soil adjacent, who own usque ad filum aquae.

Hardin vs. Jordan, 140 U. S., 371.

Such is also the law of the State of Michigan.

G. Rapids Co. vs. S. G. Rapids Co., 102 Mich., 227.

Such is also the doctrine of the New York Court of Appeals.

Gouverneur vs. Ice Co., 134 N. Y., 355.

On p. 402 of 140 U. S., this court says:

"If there should arise any question between the plaintiff, or "other riparian owners of lands situate on the margin of the "lake, as to the convergence of the side lines of the plaintiff's "land in the lake, it can be disposed of by the parties themselves "by a resort to equity."

The appellant "resorted to equity" by the present bill for this very purpose of determining the convergence of the side lines of its "land in the lake," and thus fixing the boundaries of its ownership of its submerged land.

See, also,

Railroad vs. Schurmeier, 7 Wall., 272.
Barney vs. Keokuk, 94 U. S., 324.
Grand Rapids Co. vs. S. G. R. Co., 102 Mich., 227.

In the Grand Rapids case, the Michigan Supreme Court followed this court in the above case of Hardin vs. Jordan, 140 U. S., 371, and overruled its decision in the previous case of Clute vs. Fisher, 65 Mich.

The Grand Rapids case was, like the present, a controversy between riparian owners on an inland lake in Michigan, as to their respective rights to the lands under water. The plaintiff contended that it had ownership of the bed of the lake within the lines of its fractional subdivision extended into the water. The defendant claimed that its title ran to the middle line of the lake, the submerged land to be divided proportionately to the extent of its shore line, and equitably with regard to its neighbors' claims. The defendant's claim was sustained, and Clute vs. Fisher, 65 Mich., 48, was overruled.

In that overruled case, Clute's claim that he owned the soil under the water which would be included by fully extending the lines of his fractional subdivision of shore, had been sustained.

This overruled decision, Clute vs. Fisher, is what the appellees in the case at bar claim to be the law governing the present case!

In a leading Michigan case, a bill was filed to determine the boundary lines between adjoining riparian owners on the waters

of Green Bay, Lake Michigan. The court below dismissed the bill. The Supreme Court of Michigan reversed the decree, and ordered a decree for complainant,—further proof to be taken if necessary as to the details of division. This resulted in the parties coming together as to the division. This Court should do the same thing here, and doubtless then the parties will agree on the details of division. The Michigan court followed the rule of measurements and decision laid down by Mr. Justice Gray in the Massachusetts case of Wonson vs. Wonson, 14 Allen, 83.

Blodgett Lumber Co. vs. Peters, 87 Mich., 498.

10. The appellant in the present case certainly had the title to this disputed submerged territory; and it had filled in a part of it and occupied it with buildings. The Cleveland Company, one of the appellees, expended a large sum in explorations upon the same territory and took out much ore, and made a profit of over $100,000 beyond expense. The following case is a direct authority in this court that appellant has a right to demand from the appellee, the Cleveland Company, the value of the ore taken by it from the disputed tract.

Schraeder M. Co. vs. Packer, 129 U. S., 688.

But appellant offered, at the hearing, to consent that the Cleveland Company might retain this. An instance in principle directly in point, is found in a case I argued in this court, where, by such consent, improvements were taken as an equivalent for back rents, without an accounting.

Allore vs. Jewell, 94 U. S., 506, 512, bottom.

As to the other appellee, the Lake Superior Company, appellant offered to repay to it all its expenditures upon the disputed territory, concerning which (if parties cannot agree), a reference may properly be ordered.

11. As to Mutual Mistake and Estoppel. In the short period of time between the two cases of Clute and the Grand Rapids Company, all the parties to this suit, by agreement, drained the lake at their joint expense;—they all then supposing the law of the state to be what was held in Clute's case. In like manner, all

parties supposing that case to be the law, explored the disputed territory and operated thereon.

The drainage contract was executed under this mistake of law which is to be treated, in equity, as a mistake of fact. In the maxim, "Ignorantia juris haud excusat," the word "jus" signifies the ordinary law of the country. Accordingly, that maxim does not apply where the word "jus" denotes a private right. Private right of ownership is a matter of fact; and where parties contract concerning it under a mistaken view of the law, that error is treated as a matter of fact, and not of law.

Cooper vs. Phibbs, L. R., 2 H. L., 170.
Renaud vs. Clink, 91 Mich., 3.

In Story's Equity, Sec. 130, it is said that where a party acts or agrees, in ignorance of any title in himself, this amounts to a mistake of fact.

See, also,

2 Pomeroy's Eq., Sec. 849.
Wilson vs. Life Co., 60 Md., 157.
Lansdowne vs. Id., 2 Jac. & W., 205.
Reynall vs. Sprye, 8 Hare, 222.
Blakeman vs. Id., 39 Conn., 320.
McCulloch vs. Wellington, 21 Hun., 5.
Hinkley vs. Crouse, 125 N. Y., 930.

The Michigan Supreme Court, in a case where it was claimed by defendant (as it is here) that a division line had been agreed on, and marked, and possession exercised accordingly,—but in ignorance of the law, i. e., private title (p. 556)—held that there was no estoppel against plaintiff's asserting title.

Wilson vs. Hoffman, 70 Mich., 552; see p. 556, Finding No. 17.

So, estoppel cannot arise from such a mistake as above.

The drainage contract was not made to settle any question of boundary, title, or riparian rights. It was entered into *diverso intuitu*. It is wholly silent as to any question of title, or of riparian rights, or of interlocking boundaries.

The reason of this was that all parties were laboring under the mistake that, under Clute vs. Fisher, they possessed no appur-

tenant riparian rights, but only their subdivisions squared out under the water.

An agreement, to operate as an estoppel as to boundary, must have been made for the express purpose of fixing that boundary.

Jones vs. Pashby, 67 Mich., 459, 462.

In the absence of such an agreement, occupancy or improvements will not preclude.

Chipman vs. Crooks, 41 Mich., 595.
Cronin vs. Gore, 38 Mich., 381, 385.

The testimony of Mr. Alfred Kidder and the other witnesses to the point shows that at the date of the drainage contract, they considered all questions of riparian rights put at rest by the Clute decision; and upon that mistaken view of the law appellant removed its buildings from that part of the disputed submerged territory which it had filled in and built upon.

But this court has itself made a holding which is decisive on this very point of mutual mistake and estoppel, taken by appellees and sustained by the court below.

Schraeder M. Co. vs. Packer, 129 U. S., 688.

This court held that consent to mark a boundary line, in ignorance of the facts (and private title is, as shown above, a fact), does not estop when the mistake is discovered; nor can the party cutting timber on the disputed tract, up to the mistaken boundary line, be protected as a licensee from the other party. This court in so holding unanimously followed the decision of a great judge, Mr. Justice Gibson, in Pennsylvania.

Perkins vs. Gay, 3 S. & R., 327, 331.

See, also, to the same effect,

Hatfield vs. Workman, 35 W. Va., 578, 585.

In a notable case in Massachusetts, parties intending to establish the true line, agreed on it by parol. It was not, in fact, the true line, but they held possession according to it, and one of the parties, being about to sell to the defendant, stated to the purchaser that the agreed line was correct and that he (one of the parties), did not claim beyond it. The purchaser then bought,

and made improvements next to the agreed line, with the knowledge of the adjoining owner, who was present and repeatedly pointed out the line, and gave no notice of any claim. He subsequently discovered the true line, and that it extended beyond the improvements; and the court held him entitled to remain.

Brewer vs. B. & W. R., 5 Metc., 478.

But, further, it is the doctrine of this court that there can be no equitable estoppel (such as is claimed by appellees from the drainage contract), to prevent the appellant from asserting its title to 30 acres of the bed of the lake in front of its land bought from the United States), where no element of fraud or deception appears; and in the present case, all three parties, appellant and the two appellees, acted in perfect good faith, relying on the overruled case of Clute vs. Fisher.

Henshaw vs. Bissell, 18 Wall., 255, 271.
Brant vs. Va. Coal Co., 93 U. S., 326, 336.

Also; this court has held that there can be no estoppel where all the facts were equally known to both parties, which is the undisputed fact in the present case.

Steel vs. Smelting Co., 106 U. S., 447, 456.

12. By the decision below the stockholders of the appellant company have been deprived of about thirty acres of mining land belonging to them in law and equity under the law of the United States and of the State of Michigan.

This court should exercise jurisdiction and should reverse the decision below, and divide up the submerged area equitably, and in substantial accordance with the principles and maps set out by complainant; the improvements of the appellee, the Cleveland Company, in that area, to be set off against its profits; and the appellee, the Lake Superior Company, to be paid by appellant for its expenditures on that area.

Or, a reference may very properly be ordered to report to this court an equitable apportionment of the submerged area, and respecting the outlay of the appellees.

ALFRED RUSSELL,
Of Counsel for Appellant.

No. 260.

FILED
APR 16 1900
JAMES H. McKENNEY,
Clerk

Sup. Ct. Ry. of Clerk for C. C.

SUPREME COURT OF THE UNITED STATES

Filed April 16, 1900.

October Term, 1899.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
v.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR IRON COMPANY,
Defendant in Error.

No. 260.

SUPPLEMENTAL AND REPLY BRIEF

IN BEHALF OF THE COMPLAINANT.

MARQUETTE:
MINING JOURNAL CO. (LIMITED), PRINTERS.
1900.

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES

October Term, 1899.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
v.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR IRON COMPANY,
Defendant in Error.

Number 260.

Error to the Supreme Court of the State of Michigan.

SUPPLEMENTAL BRIEF.

Title to Lands Cannot Pass by Estoppel.

In Hayes v. Livingstone, 34 Mich. 384, the supreme court of that state, by Justice Cooley, held: "*Title to land cannot pass by estoppel;* and if the plaintiff claims not the title but the right of *permanent possession, this comes to the same result.*" Citing Nimms v. Sherman, 34 Mich. 45.

And in John Hancock & Co. v. Dix, 114 Mich. 334, in the language of Justice Hooker, the court held "It is well settled in Michigan that titles in land *cannot rest on estoppel in pais.*"

The same doctrine was held in First National Bank of Kalamazoo v. McAllister, 46 Mich. 398, 406.

Shaw v. Chambers, 48 Mich. 355.
Demill v. Moffat, 49 Mich. 126, 132.

This court has held: "the *lex loci* of the state from which the case is removed governs"; therefore these decisions of Michigan are applicable here.

Beecher v. Chesshire R. R. Co. 125 U. S. 555.
Detroit v. Osborn, 135 U. S. 492.

This court has also held: "There can be no estoppel when there is no legal power to do the act, in reference to which it is claimed the estoppel exists; i. e. parting with this land. The officers, directors and agents could not by direct conveyance transfer titles. *Neither can they by acts or omissions.*"

O. R. & N. Co. v. O. R. Co., 130 U. S. 37.
Pa. Ry. Co. v. St. Louis & R. R. Co., 18 U. S. 290, 317.
Thomas v. W. Jersey R. R. Co., 101 U. S. 71 and other authorities cited in the cases just mentioned.

We referred in our first Brief to the fact, that no mine, real estate, franchise, etc., of a Michigan mining corporation, can be conveyed without the vote of *three-fifths of the stock authorizing the same at a meeting called for that purpose.* We add the further case, Beecher v. Marquette & P. R. M. Co., 45 Mich. 103.

See that Brief, pages 21 and 22.

We have also pointed out from the Michigan decisions construing that statute, that the *deed* of a corporation *is not presumptive evidence* of the rightful character of the sale; but it must *affirmatively* appear by other evidence that authority from the stockholders has been granted to the board of directors, in order to make the sale. (See pages 31, 32 and 33 of our first Brief).

It is clear from the decision in those cases, that the Michigan supreme court did not ignore these established doctrines referred to above, as to *estoppel*, and as to conveying property of a mining corporation, and that therefore, it cannot properly be said that

this case was disposed of by that court by estoppel and independent of the federal question involved in the case. That court held as follows:

"Complainant, however, invokes the doctrine that "title to land cannot rest on estoppel on account of the "statute of frauds; and that a vote of three-fifths of "the entire stock of the company is essential under the "statute to convey title. The obvious *reply* to the first "proposition is, that it is also established, that the "statute of frauds does not apply to *boundary lines;* "and that the doctrine of *estoppel* will be applied to "the voluntary adjustment of *disputed boundaries.*

"Hayes v. Livingston, 34 Mich. 384, 397.

"Under the theory of complainant, a corporation "could not settle *boundary* lines without a meeting of "the stockholders called to pass upon the *alienation* of "its land; and the doctrine of *estoppel* could never be "applied to *a boundary line* between corporations, or "between a corporation and an individual. So too, we "*reply* to the second proposition, it may be said that "the statute does *not apply* to the *voluntary adjust-* "*ment of these lines*, but to alienation by deed of con- "veyance. *Complainant was not alienating*, dividing "or selling *any of its real estate*, within the language "of the statute.

"Howell's Annotated Statutes, Sec. 4052.

"Alienation means in law, a *transfer of title* by conveyance.

"Webster's Dictionary.

"Century Dictionary.

"The Cleveland Iron Mining Company, *claimed title "by virtue of the original patent.* Claimant owned *no "specific piece of land north of the section line, even un- "der its own theory, which could be measured by metes and bounds.*"

76 North West Rep. 403.

It will thus be seen, that Justice Grant, in delivering that opinion, did not overrule, or intend to, the established doctrine of Michigan; that there could be *no transfer of real estate by estoppel;* neither did he assert any other doctrine, as to conveyance of corporate property other than by a three-fifths vote of the stockholders; as established by the prior decisions of the court. In fact, he *affirmed* them; and then asserted, as a *reason for his conclusions*, that "*complainant owned no specific* "*piece of land north of the section line, even under its* "*own theory, which could be measured by metes and* "*bounds.*" Thus asserting that his opinion was based upon a determination that the complainant had acquired *no title in fee* to realty in the territory in dispute, to which either the doctrine of estoppel or the statutory provision referred to could apply. Thus, *holding against the title* which the complainant claims through patents from the United States government, acquired in manner alleged in the bill of complaint, and denied in the answers; *raising the federal question now before this court.* The decision of the learned judge in the lower court, when analyzed and cleared of its verbiage is, that the complainant acquired *no title in fee* in any portion of the territory under the former bed of the lake north of the south line of section 10, as claimed; and that "the *only* question involved was "simply the *adjustment of a boundary line,*" viz: where the south line of section 10 projected through the lake would be located.

The question then is whether the title of complainant consisted of a territory of *about thirty acres*, that is definitely surrounded by *courses and distances north of the south line of section 10;* or whether it is the settlement of a *division line* between two owners; there being no dispute as to ownership of the properties to

be separated. This inquiry involves the federal question in this case; and analyzed as Justice Grant has done, in delivering the opinion of the lower court, it is clear that the federal question is the *fundamental* and in fact the *only question* to be arrived at, in settling the controversy, viz: did complainant acquire the title to the thirty acres in dispute; and does it now hold that title through patents from the United States.

II.

Mistake as to title acquired from the United States Government.

There is no dispute that there were misunderstandings among the parties as to the title acquired by patents from the United States government, and that Mr. Kidder, the local superintendent of the complainant company passively recognized for a time the claim of defendants to the disputed thirty acres, on account of the erroneous decision of Clute v. Fisher, 65 Mich. 48; but before that decision, Mr. Kidder for over fifteen years, vigorously denied any rights of defendants to the territory now claimed. (See p. 108-109 of Rec.) And the complainant claiming ownership, erected on this now disputed territory between four and five thousand dollars worth of valuable buildings, in connection with its mining operations (R. p. 85) and occupied them for years; (one a machine shop, and the other a carpenter shop) and without any objection from defendants, until some time after the decision of Clute v. Fisher, 65 Mich. 48.

Justice Grant, in the opinion of the court below,

used the following language: "According to testimony "on the part of the complainant there was a dispute as "to the *boundary line.* Mr. Kidder testified, that the "superintendent of the Cleveland Iron Mining Com- "pany asked him for a deed of the land lying north of "the section line, and that he for his company *declined "to give it, making the same claim that he now asserts.* "If his testimony be true, and for this purpose the "company must stand by its own testimony, *there was "a dispute and it was settled by the agreement.* Complain- "ant recognized it for *nearly five years,* and saw all "these expenditures made by the defendants without "protest."

The learned judge speaks of the territory as *a disputed boundary merely;* that the testimony of Mr. Kidder showed, that there had been a *settlement of boundary.* This the pumping contract, the agreement referred to by Justice Grant, *does not show;* and the evidence of Mr. Kidder is entirely silent as to any such settlement, and none took place. Mr. Kidder's testimony does show that he supposed by the Clute v. Fisher decision the complainant was deprived of its rights, and that on that account for *nearly five years he did not resist* the assertion of rights on the part of the defendants, because of the decision of Clute v. Fisher and until it was overruled by the Michigan supreme court.

In the case of Oregon Railway & Navigation Co. v. Oregonian R'y. Co., 130 U.S. 39, one of the cases cited above, this court held, that a railroad there mentioned was turned over by contract to another company for a period of ninety-nine years; that it was done *without charter or legislative authority;* the court holding: "We think it may be stated as the just result of these cases and on sound principle, that *unless specially authorized*

by its *charter*, or aided by some *legislative action*, a railroad company *cannot*, by lease *or any other contract*, turn over to another company for a long period of time its railroad and all its appurtenances." In that case it was asserted as a defense, that the parties had *entered into a performance of the contract and continued the same for three years;* and that therefore the parties were *estopped* to object to the contract as *executed without authority*. This court held to the contrary, as follows:

"To say that a contract which runs for *ninety-six years*, and which requires of both parties to it continual and actual operations and performances under it, becomes an executed contract by such *performance for less than three years*—is carrying the doctrine much farther than it has ever been carried; and is decidedly a *misnomer*. This *class of cases is not governed by the doctrine of part performance in a suit for specific performance;* nor is this a suit for specific performance. This is an action at law to recover money under a contract which is void, where for nearly *three years* the party acted under it, but in which one of them refuses longer to be bound by its provisions; and the argument now set up is, that because the defendant has paid for all the actual use it made of the road, while engaged in the actual performance of the contract between the dates thus given; it is thereby bound for more than ninety-three years longer by the contract, which was *made without lawful authority by its president and board of directors*. We consider this proposition, as needing *no further consideration except a reference to the discussion of the same subject.* in Thomas v. W. Jersey R. R. Co., and Pa. R. R. Co. v. St. L. A. & T. H. R. Co., already cited."

So we say in the case at bar, that the same doctrine

applies when defendants claim, and the court below held, that because for *nearly five years* the superintendent of complainant, under a mistake recognized defendants in possession of the disputed territory which they held without right; and we assert that the lapse of such time under such mistake as to ownership, and of the short time taken in which to investigate the matter after discovering the mistake, to-wit, four or five months, cannot possibly operate to take from complainant the legal title to a mine, consisting of *thirty acres* of great value, a mine discovered by complainant. There is no equity in such claim, for, as we have specifically pointed out in our original brief, the defendant The Cleveland Iron Mining Company has reaped a profit over all disbursements of over $100,000 from the mistaken occupation. And the defendant The Lake Superior Iron Company, will suffer no loss when repaid the small expense for diamond drilling and interest thereon, which the complainant specifically offers in its brief to pay, and consents that this obligation be made a condition of the decree in complainant's favor.

(See pages 105 to 110 of our original brief.)

III.

What is a division line that may be acquiesced in without action of stockholders, and by estoppel.

As we have pointed out, Justice Grant in delivering the opinion of the court below, held that the statute against transferring title by estoppel and the statute

against conveyance of corporate property without action of stockholders, did not apply in this case, because it involved simply the settlement of a *dividing line, or disputed boundary line.* Citing Joyce v. Williams, 26 Mich. 332; Smith v. Hamilton, 20 Mich. 433; Jones v. Pashby, 67 Mich. 459.

See 67 N. W. Rep. 459.

And the learned justice held as follows: "The rule "is settled by the decisions of this court, that where "disputed boundary lines have been established by ex- "press agreement, or under such circumstances that "an agreement will be implied, and parties have for "any considerable time recognized them, they would "be upheld, though title by adverse possession could "not be maintained"; referring to the cases just cited "above.

This holding of the learned judge *should be considered together* with a further explanation of his meaning, in the opinion just below the above quotation, as follows: "*Complainant owns no specific piece of land north "of the section line*, even under its own theory, which "could be measured *by metes and bounds.* How much "if any it owned, could only be determined by agree- "ment, or the decree of a court of equity. If it sur- "rendered land north of the line, it gained other on "the south. *There was no such alienation of land, as "required the vote of the stockholders.*" Thus we see that in these holdings the learned judge had in mind simply the settlement of a *boundary line, a division line;* and he so held upon the hypothesis as we have asserted, that "the complainant *owned no specific piece of land north of the section line, which could be measured by metes and bounds;*" and that the inquirywas simply a determination of where the south line of section 10 was located, as the boundary between ownership in

the land under the lake. Built upon this erroneous hypothesis, which is *a denial of the rights of complainant acquired under the laws of the United States, which involves the federal question here under consideration*, the learned judge in the court below treats the whole inquiry as but the settling of dividing lines, and determines the entire case upon that basis; expressly holding, that the doctrine of *estoppel* forbidding the transfer of realty by estoppel does not apply; because "complainant owned *no specific piece of land north of the section line which could be measured by metes and bounds*," and that the statute against alienation without a vote of the stockholders does not apply, for the same reason. The court then further considering the pumping contract, in that connection, uses the following language: "It was executed with all the formalities of a deed; it had the seal of the corporation; complainant as well as defendants paid out large sums of money under it. All are now estopped to deny its due execution and validity." There is much confusion of ideas in this last quotation from the opinion of the learned judge. As we have pointed out, he held as appears above that the statute of frauds does not apply because there is no title being transferred; because complainant *had none north of the south line of section 10*, and at the same time conceding that title to land cannot be transferred by estoppel under the laws of Michigan; and then the learned judge uses the unexplainable language, inconsistent with his holding, that the pumping contract "was executed with all the formalities of a deed; it had the seal of the corporation; complainant as well as defendants paid out large sums of money under it. *All are now estopped to deny* its due execution and validity." Such holding, if meaning simply what he had just

held, that the "complainant *owned no piece of land north of the south line of section 10, which could be measured by metes and bounds*," then it would be consistent; but not if applied to the claim of complainant, that it acquired through patents from the United States thirty acres of land north of that south line of section 10 which defendants now claim to own, and assert adverse title to. The opinion of the learned judge quoted from on these points is confusing, but serves to point out how impossible it is to deprive a mining corporation, or in fact any other owner, of his title to land by a theory of estoppel; and how difficult to deprive a mining corporation of its mining lands and franchise without the assent by three-fifths vote of all the stockholders consenting thereto. That nothing can be done except possibly the settlement of disputed dividing lines. Referring to the cases cited by Justice Grant—Jones v. Pashby, 67 Mich. 459; opinion of the court delivered by Justice Morse. There it was held, "Where parties by mutual agreement, and for that express purpose, meet and fix a *boundary line*, and thereafter acquiesce in the line so established *between* them, *such line* will be considered the *true division line*, notwithstanding the period of such acquiescence falls short of the time fixed by the *statutes of limitations* for gaining title by adverse possession."

And on page 462 of the same opinion, Justice Morse states the facts as follows: "In this case the *deeds* were so ambiguous as to require their *meaning to be settled in this court as to where the division line would run between the parcels conveyed and divided thereby.*"

Thus, the question determined was, what the *deeds fixed* as the proper line; not the question of the power to convey property by estoppel—the deeds had already been made.

In the case of Smith v. Hamilton, 20 Mich. 438, cited by Chief Justice Campbell, delivering the opinion of the court, held, "Where the transaction *has not been*, such as to *amount merely to an honest intent to determine a doubtful line*, the authorities have *not* permitted an agreement to stand which would operate as a violation of the statute of frauds; but where the parties have *only tried to find the true boundary*, it has been held that the statute was not infringed, and the line was fixed by acquiescence." Thus, affirming that where there was any real dispute of ownership, it would make void the statute to enforce it; but where the parties have only tried to fix the true boundary line, it would not be infringed; that is not the case at bar.

In the case of Joyce v. Williams, 26 Mich. 332, also cited, it was held: "Where two parties who have together purchased a lot, procure the same to be surveyed for the purpose of establishing the boundaries of the lot and of *dividing* the same in *halves*, and thus make a practical and actual division of it, and both occupy and make improvements upon their respective halves, with reference to such division, a long acquiescence in such division line, though not sufficient to create a bar under the statute of limitations will work an estoppel." This was simply the establishment of a *division line*, and not the *transfer* of title by *metes and bounds as in this case.*

The territory claimed by complainant, as its riparian ownership under Lake Angeline, as appears in Exhibit A to the bill of complaint, page 14 of the record, consists of two triangles, each resting upon the south line of section 10 as a base, and surrounded by said south line of section 10, and lines extended from meander corners 13, 14, 15 and 16 to the center of the

lake; or to a point claimed by complainant to be the center—a point the exact location of which is to be determined by adjudication of the court; *which inquiry involves the federal question as its basis.*

We submit that the holding of the learned judge delivering the opinion of the court below, is not well founded when asserting that "*complainant owned no specific piece of land north of the south line of section 10;* and when holding that the controversy was simply the settlement of a boundary line. We submit that as an underlying principle of inquiry in this case, and in all the determinations of the court below, there appears the inquiry, did the complainant own, and does the complainant now own, a portion of this territory north of the south line of section 10 by virtue of its patent rights acquired from the United States government. This is the federal question in this case; and all determinations made by the court below rest upon that inquiry. A claim asserted by complainant, and denied by the defendants. Thus, all questions now for the consideration of this court, rest upon and are subservient to the *federal question;* and there is no question here independent of it, that can dispose of this case without dealing with and disposing of that question.

IV.

Pumping Contract.

Defendants' counsel have construed the contract of the 17th of March, 1892, as amounting to a conveyance to them of the thirty acres in question. That is, they assert at least in their arguments that they acquired title by virtue of their patents to the south line of

section 10; that this pumping contract is a *conveyance* to them of complainant's rights thereto. The complainant acquired title from the government to about thirty acres of land under the bed of the lake, by virtue of patents from the government. There is no element of *conveyance* in the contract; it is simply an agreement for the pumping of the lake, in which complainant and defendants are to join in the expense and in which complainant agrees, as a part of its duty, to maintain and keep in repair a certain flume which it is to construct, and which it is to maintain and keep in repair and in successful operation "until the iron ore to which said third party is entitled lying on, in or under the portion of the bed of said lake lying south of the south line of said section is mined and exhausted and then to turn over said flume in good repair to first and second parties hereto without charge and to allow them to operate and maintain the same for the purpose of continuing said drainage, giving the employes of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, etc.

(See pages 90 and 91 of Record).

There is not one word in the paper bearing the semblance of a conveyance of the territory under consideration—it simply contains the suggestion of a *mistake* in statement as to *when* the ore should become exhausted, plaintiff should cease to be required to maintain the flume, and *when* defendants should have the right so to do. The idea that this paper, (even if there had been authority in the employes of the company to make a conveyance of the territory) is a conveyance in any form, is simply absurd; and its examination points out forcibly to what extremity defendants are driven, in asserting ownership to this large and valuable min-

ing territory which they do not own and never have owned, but which came to the complainant through patents from the United States government.

The learned judge in the court below holds, referring to this contract, as follows: "If set aside, the contract is at an end, and the lake *must be left to fill up*, if either refuses to *enter into a new contract*". We ask, why so? It is a contract for the pumping of the lake, *and that only:* there is no prayer in the bill in this case to set aside the contract. Neither is there any suggestion in the contract or bill of complaint that complainant can cease to pay its proportion of drainage expenses until its ore shall become exhausted; and there is no evidence of its exhaustion as yet; or when it will become exhausted. What complainant is asking for in this court is, that the defendants be restrained from interfering with the property owned by it; formerly covered by the waters of the inland lake, and from removing or attempting to remove or interfering with the iron ore in and under the territory described. And that the court decree a designation of territory owned by complainant by lines that shall equitably locate said territory. And also decree that the complainant is the owner of the territory abutting lots 2, 3, 4 and 5 of section 15, within the boundary lines set forth and claimed, and that the claims and assertions of defendants as to ownership of said territory so specifically referred to are void, and without force; and do not constitute a cloud upon complainant's title thereto, etc.

(See page 13 of Record).

There is no foundation for saying that the pumping contract should be terminated by the decree of the complainant, as prayed for. It would certainly eliminate the many assertions of ownership of the territory in dispute made by defendants; but it could not ter-

minate the pumping contract as it is not a conveyance of the territory in question; either legal or equitable. It shows for itself and by the testimony of Mr. Kidder the local agent of complainant, who negotiate the making of that contract, that he had no such idea in its framing, as conveying any rights which his company might have, as he knew he had no authority to do so.

V.

Complainant's Exhibit F.

Mining engineer Bradt describes minutely the division of Lake Angeline, which consists of 148.60 acres, into three parts, between complainant and each of the defendants, in proportion to the shore frontage shown by the meander of the government. This appears from the maps and field notes of the U. S. Land Office, which are upon pages 34 to 37 of record; and also by the testimony of Mr. Bradt on pages 36 to 43 of record. Complainant's Exhibit F, page 41 of the record, covers what is contained in complainant's Exhibit A, attached to the bill of complaint (which shows only the meander lines of the lake, and the division of the lake by convergent lines to the center) and designates the territory of complainant under the lake by courses and distances marked thereon (see page 14 of Rec.) In addition to what appears in Exhibit A of the bill of complainant referred to, complainant's Exhibit F, page 41 of the record, has the computations of engineer Bradt, as to the relative acreages owned by each party, location of mining work, railroad, etc. Taking Bradt's testimony from page 36 to 43, it clearly marks out how accurately and equit-

ably the lake can be divided by convergent lines to a center. By these lines The Cleveland Iron Mining Co. is shown to have a frontage of 107.55 chains and an acreage of 69.58 acres; The Lake Superior Iron Company a frontage of 56.58 chains and 35.20 acres; and The Pittsburgh & Lake Angeline Co. 68.15 chains, 43.83 acres, as marked on the northeast corner of complainant's map, Exhibit F. The relative shares are stated in the evidence by the witness Bradt, on pages 39 to 41 of the record. We are not strenuous as to this precise mode of dividing the lake among abutting owners: if the defendants are able to point out to the court a more equitable method of apportionment. We simply insist, that in the most equitable manner, according to the judgment of the court, the territory under the lake is to be apportioned among the abutting owners according to their relative shore frontage. And the authorities which we cite sustain the position, that this should be by convergent lines to a common center. Counsel for The Cleveland Iron Mining Co. insist, that under our mode of partitioning the lake, it would be entitled to a portion of the small arm that extends southeasterly below what would be the south line of section 10 if projected east and west through the lake; and insist that as it appears that the complainant has mined ore in that territory which it claims under this arm of the lake, that there is no method of determining the amount of ore that has been mined; and therefore, equity could not be arrived at in an accounting for ore taken by complainant, as well as by defendants. This is shown to be fallacious by the cross-examination of Mr. Bradt by Mr. Hayden, counsel for defendant, The Cleveland Iron Mining Company (see pages 53 to 57 of Rec.) Mr. Hayden inquired of the witness Bradt, as to the extent of mining

conducted at that point, and as to the amount of ore removed. To which the witness answered that the ore was removed *down to the second ore level, 209 feet below the surface;* that it was first class ore, best grade; that he could not state the number of tons; that he *has maps of the territory, and can produce them.* (See pp. 53 and 54 of Rec.)

The same witness further testified, that *he could estimate closely the ore taken out,* from the maps, showing *the plan of the workings;* that they had mined out *two levels* when the work was abandoned there; that there was ore below those levels. (See p. 56 of Rec.)

So, with maps of the workings, only two levels having been mined out, maps showing the levels, there would be no difficulty in coming very closely to the tonnage of the ore mined in that locality, if necessary to do so, for an equitable accounting between the parties. The space there which defendant Cleveland Iron Mining Co. would be entitled to, if any, is very small, and but a mite, in proportion to the mining which it has done upon the territory of the complainant now in dispute.

On a decree for complainant, the case could be referred to a Master to take proofs as to an equitable adjustment between the parties with regard to ore mined. So far as appears upon this record, it is shown, that during the years 1895 and 1896, the two first years that the defendant Cleveland Iron Mining Co. mined on this territory of complainant, it cleared a profit from the ore there mined, of over $100,000; the particulars of which we point out in our first brief, summarized on pages 106 and 107.

VI.

Defendants Without Equity When Claiming the Land in Question.

We have demonstrated,

FIRST.—That complainant acquired title to the territory in dispute through patents from the government, and mesne conveyances to it, as riparian rights appurtenant to its shore frontage.

SECOND.—We have demonstrated, that the lands have never been conveyed by the corporation, and that the stockholders of the company never authorized any transfer of such real estate.

THIRD.—We have also demonstrated, that in Michigan, real estate cannot be directly or indirectly transferred, or title taken away, by estoppel.

FOURTH.—We have demonstrated, that the disputed territory is about thirty acres, surrounded by courses and distances, and must of necessity be of irregular form, no matter how located.

FIFTH.—We have conclusively pointed out, that the learned judge delivering the opinion of the court below, in this case, held, that the complainant acquired *no title to any land north of the section line* which could be measured by *metes and bounds;* and that based upon that denial of complainant's rights acquired under the government, the learned judge held, *that the doctrine of estoppel did not apply* to the case, and that the doctrine which forbids alienation of corporate property without a three-fifths vote of the stockholders, does not apply (76 Northwest Rep. 403); and based his adjudication upon the assertion that complainant had

not acquired any title north of that section line; and he held that the only dispute that existed between the parties was, where that *line lay between the property* which it did acquire and that which it did not acquire. Thus resting his entire decision upon the denial of the rights which complainant asserts, it acquired through patents from the government north of the south line of section ten, and which *involves the federal question before this court.* If complainant acquired title to this land under the lake as riparian owner, how has it lost it? It has not conveyed it away. It is not estopped because its agent simply supposed for about five years, after asserting notoriously the ownership of the territory in dispute for about 20 years, that by the decision of Clute v. Fisher, 64 Mich., a mode of division of the lake had been established which deprived complainant of ownership. (And as stated above, the court below held estoppel did not apply.) That court held the ruling in Clute v. Fisher erroneous, and affirmed the doctrine of ownership for which we now contend.

We ask then, was the complainant deprived of its title by the confessed erroneous holding by the supreme court of Michigan, which it subsequently confessed and corrected in Ice & Coal Co. v. Ice & Coal Co., 102 Mich.? We submit, to claim such to be the case is absurd. Real estate titles do not stand upon such fickle basis, and the rights of stockholders in mining corporations cannot be frittered away by any such theory.

VII.

Claim of Counsel For Defendant The Lake Superior Iron Company, as to Jurisdiction.

Counsel for the defendant the Lake Superior Iron Company, assert in their brief, pages 19 and 20, as follows: "In this connection we call attention to the *entire want of anything contained in the complainant's bill, constituting a claim of any title, right, privilege* or *immunity* under the constitution, or any treaty, or statute, or commission held or authority exercised under the United States. That it is *not only true*, that complainant *did not claim*, that the *patents of the United States conveyed any title, or interest in the lake bed; but it expressly claimed and asserted by the bill, that the land conveyed by the patents was limited to the area outside of the shore line;* and that the rights of the abutting owners in the lake bed, were conferred *not by patent*, but by the rules of the common law as the same were in force in the State of Michigan."

This is an erroneous statement, as will be seen by an examination of the bill.

Paragraphs 1 and 2 allege specifically; that the title acquired by the defendant The Lake Superior Iron Company was *through a patent* to Briggs, of the acreage contained in the upland abutting on the inland lake, and mesne conveyances to that defendant. That the land so conveyed was as described in the records of, and on the maps in the office of the surveyor general of the United States, and in the record and on the maps in the local U. S. land office at Marquette, Mich. —That said lands contained 112.21 acres, according to the official plat of the township (see page 1 of record.)

It is an established fact, that the United States government, in selling fractional subdivisions of land, abutting on lakes or rivers, in fixing the price to be paid therefor, require *payment only* for the acreage contained in the fractional subdivisions of the *upland* bordering on the water; and the acreage is thus definitely established by the surveyor general, from surveys made under his direction, to determine the amount to be paid for such land. It is also *thoroughly established, that the title to the inland water* and the land thereunder *to the center* of the lake, or the thread of the stream, passes to the purchaser of the abutting land, from the government, by virtue of the purchase of such fractional subdivisions. By this rule, the acreage specifically paid for by Briggs, the patentee, in that instance, was 112.20 acres; but he acquired by virtue of the U. S. patent the *riparian* rights opposite this land, viz.: ownership to the center of the lake. The United States authorities cited in our briefs, fully sustain this claim. The title conveyed by him to the defendant the Lake Superior Iron Company included the *riparian right* to the center of the lake opposite those fractional descriptions.

Paragraphs three and four of the bill allege that the patent from the government to Burnell conveyed the fractional portions in the east half of section 10, and in the fractional west half of section 11, township 47 north, range 27 west, amounting to 555.15 acres (See page 3 of record). By examination of the government maps on pages 34, 35 and 36 of the record, it will be seen that 555.15 acres was the total acreage of the upland. The United States government received only pay for the upland, but it conveyed the *riparian* ownership in and under the waters of the lake (see pages 3, 4 and 5 of record).

Paragraph 5 of the bill, which includes paragraph 6 of the bill as filed, specifically describes patents to Burt, Pettit and others, for lots 2, 3, 4 and 5; and how they passed by mesne conveyance from them to the complainant; and alleges that said fractional subdivisions known as lots 2, 3, 4 and 5 of section 15, in township 47 north, range 27 west, designated the acreage of the upland abutting on the lake to be paid for as 140.85 acres, which also conveyed all riparian rights in the abutting inland lake.

Complainant there alleges, that it has been the owner of lot 2 of said section and in possession of the same since the year 1864, and that these fractional lots referred to, as vested in it and defendants constitute the *entire* territory fronting on this inland lake, known and described as Lake Angeline. And that all of the fractional government descriptions of land, fronting on this lake, are owned by the complainant or the defendants, according to the specific interests of each in the frontage. Complainant further alleges that the abutting owners upon said inland lake are *owners of the land and minerals under said lake*, according to the amount of frontage land upon said lake owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake. Thus alleging the purchase of all the fractional description surrounding the entire lake, by complainant and defendants, from the United States, through patents from the government, and mesne conveyances to them, by virtue of which they acquired the *riparian ownership of the entire lake.*

Paragraph 7 of the bill sets forth the field notes of the United States government, describing the courses and distances of the meander line, surrounding this inland lake, and locating them upon the map (see pp. 9 and 10 of Record).

Complainant in paragraph 7 alleges that the territory covered by the lake belonged to it by virtue of its ownership of lots 2, 3, 4 and 5 of section 15, bordering upon the shore of the lake, designated by courses and distances from the surveys of the government appearing upon its maps, and from the meander courses and distances of the riparian territory owned by it.

(See pp. 10 and 11 of Record).

Having thus described complainant's rights, in this territory, the bill alleges as follows: "And your "orator alleges, that *it owns said territory formerly un-* "*der the waters of said inland lake, by virtue of its* "*riparian ownership as abutting owner upon the south* "*side of said inland lake under the laws of property* "*ownership*, established by the decisions of the courts "of the State of Michigan, *and of the United States*, as "well as other states and countries; and that it has "ever been the owner thereof *since its purchase of said* "*lots 2, 3, 4 and 5 of said section 15, as previously set* "*forth* (see p. 11 of Record).

In this same paragraph complainant further alleges, "And your orator alleges, that it and the said defend- "ants *are the owners of the entire territory formerly* "*covered by the water of the said inland lake known as* "*Lake Angeline;* and that the exact boundary lines of "ownership, have never been *established and fixed* be- "tween your orator and the said defendants; and that "your orator desires that the same may be fixed and "established by the decree of this honorable court, in "accordance with the principles of law and equity" (see pp. 11 and 12 of Record).

Thus, complainant alleges ownership to the center of the lake, by virtue of riparian rights acquired from the U. S. government, through its patents; rights acquired appurtenant to the conveyance *under the laws of the United States.*

Complainant asks that the territory under this lake be apportioned to the three parties owning the entire surrounding and all of the riparian rights there, according to the amount of shore frontage owned by each.

That equity should thus apportion such rights, is fully sustained in

Lincoln v. Davis, 53 Mich. 390.
Jones v. Lee, 77 Mich. 40.
Ice & Coal Co. v. Ice & Coal Co., 102 Mich. 237.
Hardin & Jordan, 140 U. S. 402.

We have specifically referred to these decisions, and quoted from them, on pages 14, 15 and 16 of our original brief.

In paragraph 8 of the bill, complainant alleges that the Lake Superior Iron Company asserts ownership to a large portion of its said territory covered by the waters of Lake Angeline, to-wit: "All of said inland lake lying west of the north and south center line of said section 10, and north of the section line between said sections 10 and 15, if projected east and west through the said inland lake", etc.; and that the Cleveland Iron Mining Company "claims to be the owner of the territory of your orator above described, as owned by your orator, formerly covered by the waters of said inland lake, lying east of the center line of said section 10 and north of the south line of said section 10, projected through the territory previously covered by the waters of said Lake Angeline * * That the said claims * * constitute a cloud upon your orator's said title, and apparent encumbrance thereon" (see pp. 12 and 13 of the bill).

Thus, there is alleged by the complainant, in the most positive form, *title acquired from the U. S. government to lots 2, 3, 4 and 5 of section 15, and to the riparian rights in the inland lake in question abutting*

those lots to its center. The assertion in opposing counsel's brief, that there is an "*entire want of anything contained in the complainant's bill, constituting a claim of any title, right, privilege or immunity under the constitution, or any treaty, or statute, or commission held* or authority exercised under the United States", *is not true.*

In Cohens v. Virginia, 6 Wheat. 264, 379, this court held, "A *federal question is presented, when there is in-* "*volved a controversy as to riparian rights, acquired un-* "*der the laws of the United States*".

In the case of Shively v. Bowlby, 152 U. S. 10, this court held, as to *riparian* rights: "This is a *direct ad-* "*judication against the validity of a right or privilege* "*claimed under the laws of the United States, and pre-* "*sents a federal question within the appellate jurisdic-* "*tion of this court.*"

These cases referred to, and others, are cited in our first brief on this hearing, from pages 14 to 20.

In the case of Green Bay & M. Canal Co. v. Patent Paper Co., 19 Supreme Court Rep. 100, this court held, "No *particular* form of words or phrases has ever been "declared necessary, *in which the claim of federal* "*rights must be asserted. It is sufficient if it appears* "*from the record that such rights were specifically set up* "*or claimed in the state court, in such manner as to* "*bring it to the attention of that court.* The true and "rational rule, this court said in Bridge Proprietors v. "Hoboken Co., 1 Wall. 143, is, that the court must be "able to see clearly, *from the whole record*, that a cer- "tain provision of the constitution, or act of congress, "*was relied on* by the party who brings the writ of "error, and that the right *thus claimed by him was* "*denied*".

And other cases cited in our brief in resisting motion to dismiss the writ, pages 39 to 42, and 10 to 13.

Complainant having thus specifically alleged ownership to the center of the lake under riparian rights, acquired by virtue of patents from the government and mesne conveyances to it, the defendant The Cleveland Iron Mining Company alleges, that it owns the territory in dispute to the south line of section 10, if projected east and west through the lake, and its allegation is as follows: "It was the intention of the "government to convey to said Lorenzo D. Burnell "the *entire east half of section 10, and the entire west "half of section 11*, described in the bill, to the full "extent and limits of the section line of said section, "as bounded on the west by the north and south center "line of section 10, and on the east by the north and "south center line of section 11, and on the south by "the south line of sections 10 and 11, *regardless of the "meander lines of said Lake Angeline.* That it was "the intention of both the government and the grantee, "under and by virtue of the terms of said patent, that "the patentee should have *the full limit of said two "half sections as aforesaid*," etc.

Thus, the federal question is presented by the complainant asserting ownership to the center of the lake by virtue of patents from the government, and riparian rights thereunder; and the assertion on the part of The Cleveland Iron Mining Company of ownership to the south line of section 10 referred to, each claiming the *same territory*, consisting of about 30 acres of land under the inland lake. These conflicting claims, asserted under the laws of the United States, thus presented a federal question. The supreme court of Michigan passed directly upon that issue, as follows: "The Cleveland Iron Mining Company claimed title *by*

"*virtue of the original patent.* Complainant *owned no* "*specific piece* of land north of the section line, even "under its own theory, which could be measured by "metes and bounds. How much, if any, it owned "could only be determined by agreement or the decree "of a court of equity."

Defendant The Lake Superior Iron Company also asserted ownership to the south line of section 10, and all west of the north and south center line of 10, as above referred to, raising the same issue. The lower court also holding its claim to be correct.

Notwithstanding the issue thus clearly presented upon the record by the pleadings, and the clear determination of this federal question by the lower court, counsel for The Lake Superior Iron Company, in their brief filed in this court, on page 21 assert that we claimed in the court below that the patents of the United States did not purport to convey, and did not convey, any of the land or bed of the lake covered by the water, but conveyed only the upland as claimed by them, only such as lay outside of the meander lines. And on page 25 of said counsel's brief they assert "The *only claim* made in the state court, by the plain- "tiff in error, through patents from the United States "government, was this, viz: that under such patents "it obtained ownership to the lands *bordering on the* "*lake*", etc.

We asserted in most positive manner, in the court below, the ownership of complainant to the center of the lake, *by virtue of patents from the government*, and quoted the *same* authorities, appearing in paragraph 4 of our first brief filed in this court on this hearing, to which we now refer; and we have pointed out in both briefs, the facts, as stated by this court in St. Paul and Pacific Railway Company et. al., v. Schurmeier, 7

Wall. 272, and in Hardin v. Jordan, 140 U. S. 402, and other cases, that "It has been the practice of the gov-"ernment from its origin, in disposing of the public "lands, *to measure the price to be paid for them, by the "quantity of upland granted; no charge being made for "the lands under the bed of a stream, or other body of "water.* The meander lines running along or near "the margin of such waters are run *for the purpose* of "ascertaining the exact quantity of the upland to be "*charged for and not for the purpose of limiting the "title of the grantee to such meander lines.*"

Also holding, "That the beds of streams above the "flow of tide, whether actually navigable or not, *be-"longed to the proprietors of the adjoining lands.* St. "Paul v. Ritz, 138 U. S. 226." Also holding, "The "disposal of the present case, therefore, seems to us to "require no further discussion; *only an answer to the "single question—what is the common law in regard to "title to fresh water lakes and ponds? And on this sub-"ject we think there can be very little difference of "opinion.* Of course, as already stated, there is no "question where the land fronts upon a fresh water "stream or river. In such case the law is perfectly "plain. Sir Mathew Hale states 'Fresh rivers of what "kind soever, *do of common right belong to the owners "of the soil adjacent*, so the owners of the one side have "a common right to the property and soil, and conse-"quently of the right of fishing usque ad filium aquæ; "and the owners on the other side, the right to soil "and fishing, filium aquæ on their side.' "

These principles we asserted in the lower court, as now in this, and the issue upon the record, *by the pleadings*, is beyond question.

In the brief of counsel for the Lake Superior Iron Company, it further asserts, that the position taken by

us in the court below was "that such title was not con-"veyed by the patent of the United States government; "that the conveyance in the patent was *limited* to the "shores of the lake, as defined by the meander lines of "of the government survey". Speaking upon this point, the brief says, page 6. "Further, the drafting of "a patent and signing the same by the president, that "proposed to convey any portion of an inland lake "would be a nullity, as neither the president nor the "draftsman had any authority to convey more acreage "than the fractional lots consisting of the upland out-"side of the meander lines of the lake. It has been so "held by the supreme court of the United States", etc. (See pp. 35 and 36 of said defendant's brief).

What we asserted in the lower court, as to convey-ance from the government, appears in paragraph 2, be-tween pages 19 and 32 inclusive of the brief in that court; where we assert, as in our first brief in this court, in paragraph 4, pages 34 to 46; that the govern-ment officials could not, in making the patent, ignore the established rules, that the conveyance should be of acreage *contained in the upland*, and that when in the patent to Burnell, through which the Cleveland Iron Mining Company claim in this case, a part of the de-scription was, "The east half of section 10, and the "west half of section 11, township 47 N., range 27 W., "containing 555.15 acres, according to the official plat "of the United States government" (see p. 33 of Record), and when it appears by the government maps offered in evidence; as well as by the meander lines of the government of the lake in question (see pp. 34 and 36 of Record), that the upland in the east half of section 10 and the west half of section 11; as marked by the surveyors of the government upon the government maps in acreage amounts to 515.15 acres; the amount

stated in the patent, that the amount of acreage as stated was the amount for which payment was to be made, and the amount *specifically designated*, and that the balance of the territory that would have been contained in the east half of 10 and the west half of 11, had there been no lake there, became vested in the abutting owners, *under the law of the United States as to the riparian rights, passing to abutting owners in proportion to their abutting frontage;* and we cited in the court below, on page 33 of that brief, Hardin v. Jordan, 140 U. S. 402, where the following is held:

"The land department *has no jurisdiction* to transfer lands which are not at the time public property. It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them *by the quantity of upland granted; no charge being made for the lands under the bed of a stream or other body of water.* The meander lines running along or near the margin of such water are run for the purpose of ascertaining the exact quantity of the upland to be charged for, *and not for the purpose of limiting the title of the grantee to such meander lines.* It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered.

We also quoted as the law from this court, the case of St. Paul & P. R. R. Co. v. Schurmeir, 74 U. S. (7 Wall.)272. Opinion by Justice Clifford, as follows: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, *not as boundaries of a tract, but for the purpose of defining the sinuosities of the banks of a stream, and as the means of ascertaining the quantity of land in a fraction* subject to sale, which is to be paid for by the purchaser.

"In preparing the official plat from the field notes the meander line is represented as the border line of a stream, and shows to a demonstration that the water course and not the meander line as actually run on the land, is the boundary. *It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can afterwards be granted out, to the injury of the original grantees.*"

We also cited from Barney v. Keokuk, 94 U. S. 342, Packard v. Bird, 137 U. S. 661, as well as from Hardin v. Jordan, 140 U. S. 402, that the shore between high and low water marks, as well as the bed of the river, belonged to the proprietors of the adjoining lands. St. Paul v. Ritz, 138 U. S. 206, approved in Hardin v. Jordan, 140 U. S. 402.

We also, in the court below, quoted authorities holding as follows: "The *registers of local land offices are "mere sales agents for the government.* The survey and "division of the lands are entrusted to the surveyors. "Their action is *conclusive*, and the registers *are bound "to sell* by the plats furnished them. They can sell in "no other way." Citing,

Kissell v. St. Louis Public School, 18 How. 19.
Bagnell v. Broderick, 13 Peters, 450.
Barnard v. Ashley, 18 How. 43.
West v. Cochran, 17 How. 403.
Gazzam v. Lessee of Phillips, 20 How. 372.

(See pages 19 to 25 inclusive of brief in lower court, if this court considers that such brief has anything to do with this case.)

Our position has been from the start in this case, that whoever owned the fractional subdivisions of land surveyed by the United States government, acquired through the government, are owners of the riparian rights in the inland lake to its center, or to the thread

of a stream if abutting upon an un-navigable stream; and that if the United States government owned the land *until it patented it*, it would convey that title *to the center* of the lake, or to the thread of a stream, as would also a private individual conveying it subsequently, after acquiring it; and we insisted in the lower court that when in the patent to The Cleveland Iron Mining Company, the conveyance was of the *east half of 10* and the *west half of 11, limited* to the acreage, 555.15 acres, instead of 640; that the controlling provision of the patent, under the rules of the government surveys referred to, conveyed specifically as land, only 555.15 acres, the fractional subdivisions, and that the amount of ownership in the lake, which passed to Burnell and through Burnell to The Cleveland Iron Mining Company under the patent, was *only that portion* of the lake which would be a *riparian right appurtenant to the frontage acquired by it;* and that to the center of the lake only, and not to the south line of section 10, if projected through the lake as claimed by defendant Cleveland Iron Mining Company. But, supposing in our argument in the court below, we had stated some erroneous legal propositions in the oral discussion, or in this brief, what has that to do with the inquiry here? As this court has said, in the cases sighted above, the inquiry is, whether *by the pleadings* there was presented upon the *record*, an issue which involved a federal question, and the determination of which, must of a necessity adjudicate and determine such federal questions—such as, what title was acquired under the laws of the United States and what not; and whether the riparian rights passed by virtue of United States patents to complainant or to defendants; and what was the extent of the acquisition of riparian rights of each party appurtenant to convey-

ances by the government. These inquiries as we have said are expressly held in Cohens v. Virginia, 6 Wheat. 664, 379, and in Shively v. Bowlby, 152 U. S. 10, and other cases cited, *to be federal questions*, and when involved in the inquiry in the court below, entitle the parties to a writ of error to this court.

F. O. CLARK,
Solicitor for Complainant.

IN THE

Supreme Court of the United States.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,

vs.

THE CLEVELAND IRON MINING COMPANY, AND THE LAKE SUPERIOR IRON COMPANY,
Defendants in Error.

BRIEF FOR DEFENDANT, CLEVELAND IRON MINING COMPANY, TO DISMISS WRIT OF ERROR.

A writ of error to the judgment of the Supreme Court of Michigan has been allowed herein and a motion made to dismiss this action for want of jurisdiction, coupled with a motion to affirm the judgment if this court has jurisdiction hereof. This brief is filed in support of the motion to dismiss.

The plaintiff in error herein, complainant in the state court, claiming to own some land which was formerly in the bed of Lake Angeline and north of the south line of section ten, filed its bill in equity in Marquette county, Michigan, to have the boundaries of its land determined and its land set off

to it in severalty and for an accounting against the defendants for the iron ore which they had taken from the land belonging to complainant, averring that the defendants were mining and threatened to continue to mine from complainant's property.

The three parties, by mesne conveyances from the original patentees of the United States, owned the whole of the land which was formerly the bed of Lake Angeline. The two defendants claimed that the south line of section ten separated their respective properties from the complainant's property. Lake Angeline was within the municipal limits of the city of Ishpeming, Marquette county, Michigan.

The original patents under which the Cleveland Iron Mining Company claimed ownership in the bed of the lake, in terms granted the east half of section 10, and the Cleveland Company had always claimed to own the land north of the south line of section 10 by virtue of the language of these patents. In 1887 the Supreme Court of Michigan in Clute vs. Fisher, 65 Mich., p. 48, had decided that the owners of fractional parts of a section bordering upon an inland lake, owned all of the bed of the lake included within the section lines as projected into the lake. Before this decision the Lake Angeline Company had made some ground by dumping refuse into the lake and had built some buildings north of the south line of section 10, opposite the property claimed by the Lake Superior Iron Company, and learning of Clute vs. Fisher, took the advice of Mr. Clark, who appears as attorney for it in this suit, as to the effect of Clute vs. Fisher. Acting upon Mr. Clark's advice, Lake Angeline Company removed its buildings

south of the section line. The Lake Angeline Company, according to the evidence it introduced in the court below, yielded only a protesting assent to the doctrine of Clute vs. Fisher, having been advised by Mr. Clark that that case might be overruled.

In any event, according to the evidence of the Lake Angeline Company, its manager, Mr. Kidder, refused a proposition made by the Cleveland Company to the effect that the Cleveland Company would quit-claim all its interest south of the south line of section 10 in consideration for a quit-claim from the Angeline Company of all its interests in the land north of said section line. If the ordinary doctrine of riparian rights determined the rights of the parties in this suit, the Cleveland Company was, at that time, the owner of a triangular piece of land south of the said section line, out of which the Lake Angeline Company subsequently mined a large quantity of high grade Bessemer ore. At the time, however, that we are referring to no ore was known to exist under the bed of the lake and its ownership was a matter of little importance.

Subsequently, however, in the year 1886, the Cleveland Company found ore near the north shore of the bed of the lake, not, however, in territory in controversy in this suit. This ore body extended under a portion of the bed of the lake. In 1890 the complainant here discovered ore near the south border of the lake, put down a shaft and began the development of a mine. Late in 1891 or early in 1892 it became apparent that this ore body on the south shore of the lake extended under the water and the three parties to this

suit began negotiations with a view to entering into a contract to pump out the lake for the purpose of conducting mining under the bed thereof. It was, of course, of the utmost importance that the boundaries of the respective properties in the bed of the lake should once and for all be fully settled. As a result of the negotiations, the three mining companies united in a petition to the village council of Ishpeming, requesting permission to pump out the water, specifically setting forth the boundaries of their respective properties and alleging that the south line of section 10 was the boundary line between the Lake Angeline Company's and the Cleveland Company's properties. Based upon this petition to the council, an ordinance was passed wherein the same boundaries were again set forth.

Following the passage of this ordinance, on the 17th of March, 1892, the three parties to this suit entered into a pumping contract wherein they recognized the boundaries of their respective properties as set out in the previous papers and agreed to bear the expense of pumping out the water in the first instance in certain proportions, which, according to the evidence, were fixed by the above agreed boundaries. After the lake was once pumped out the two defendants here were to buy the pumping outfit and continue the drainage of the lake at their joint expense, the expense to be borne by each to be determined each year by the quantity of iron ore they respectively took from the bed of the lake. The Lake Angeline Company, in consideration of its not being required to do any of the pumping after once the lake was pumped

out, agreed to construct a flume along the south line of section 10 so as to take up all the drainage which fell south of the section line and which otherwise would have gone into the bed of the lake.

The lake was pumped dry and the two defendants at their joint expense, according to the contract, continued to keep it dry from that time on, expending therein many thousand dollars. The Cleveland Company continued to mine in its mine on the north shore of the lake, in time putting down a shaft in the bed of the lake, so that if the lake bed were allowed to fill again its mining property would be ruined.

The Lake Angeline Company began its mining operations on the south shore of the lake and in time opened up a valuable mine there. In process of time the indications pointed to the ore deposit on the south shore of the lake extending northward over the section line, although the first indications did not show very much ore. The Lake Angeline Company notified the Cleveland Company of the dip of this ore and that it probably extended into the Cleveland Company's territory north of the section line, and thereupon the Cleveland Company requested and was granted permission to go into the mine of the Lake Angeline Company and drill diamond-drill holes northward for the purpose of testing the deposit of the ore and its extent northward of the section line. Many thousands of dollars were spent in this exploration. After the discovery of the deposit north of the section line, the Lake Angeline Company wished to make a contract to take the ore out under a royalty, which, however, was refused by the Cleveland

Company and the Cleveland Company thereupon, from its own mine on the north side of the lake, tunnelled southward many hundred feet through solid rock to reach this deposit of ore, put in an extensive mining plant and drove drifts and cross-cuts, opening up a valuable mine. The ore deposit of the Lake Angeline Company and the Cleveland Company on the south side of the lake run together and in their mining operations they inadvertently trespassed on each other's territory, and both parties settled amicably for such trespass. On two different occasions, in order to prevent future trespasses, the Cleveland Company and the Angeline Company, by joint survey down in the mine, located the south line of section 10 and marked it as the boundary line for the future guidance of their miners. Maps were made from month to month by each company of its workings underground and exchanged, each party marking the section line as the boundary between the properties. In the pumping out of the lake and the mining operations conducted therein, the parties to this suit spent several hundred thousand dollars.

In June, 1894, the Supreme Court of Michigan, in Ice Co. vs. Ice Co., 122 Mich., 227, overruled Clute vs. Fisher. The Lake Angeline Company was promptly advised of this, but paid no attention to it. The mining operations were conducted thereafter as theretofore, in fact, many of these things we have heretofore stated as recognitions of the boundary line occurred subsequent to that time. Late in 1896, the large extent of the deposit of the Cleveland Iron Mining Company just north of the section line was conclusively proved up as the result of the

large number of drifts and crosscuts and development work done therein by the Cleveland Company. In November, 1896, this suit was brought. We do not think any federal question exists in this case.

It is true the defendant, the Cleveland Iron Mining Company, claimed in one defense of its answer that the United States patents, under which it derived title, gave it all the land north of the south line of section ten, and that this fact was denied by the Lake Angeline Company. The case, however, was not decided, nor made to depend, in any manner, upon the construction of such patents, but upon various other defenses made in the answer. This court will examine the opinion of the state court for the purpose of determining what questions were there actually decided.

Philip Fire Asn. vs. New York, 119 O. S., 110, 116.

Walter A. Wood Co. vs. Skinner, 139 U. S., 293, 295.

The opinion of the Supreme Court of Michigan is a part of the record here, but for convenience we would refer the court to the printed report thereof in 76 N. W. Rep., 395, where there is a map of Lake Angeline showing the section lines.

By the examination of this opinion it will be seen that no importance whatever was attached to the construction of the patents under which the several parties claim title, but, on the contrary, the bill in chancery was dismissed and the complainant denied all relief on the following grounds, which, while not stated in that order, were, nevertheless, distinctly decided by the Supreme Court.

1. That the exact boundary line between the parties was in controversy and that the parties settled such controversy and fixed the boundary by agreement among themselves, to-wit, the pumping contract and the proceedings which led up to it. In other words, there was a boundary settlement.

2. That the plaintiff in error here, by virtue of its long acquiescence in such boundary and in view of the large expenditures made and to be made, and especially by reason of the existence of the pumping contract which imposed long and continuous burdens upon the defendants (which contract the Lake Angeline Company put in evidence and insisted still remained in force at the time of the trial, and which required the defendants to pump all the water from the lake bed), was estopped from questioning the title and ownership of the Cleveland Iron Mining Company in all property north of the section line.

3. That the parties, on the faith of the pumping contract had materially changed their condition and situation and that it was impossible to restore the parties to the *statu quo* existing before the making of that contract.

Not only did the Supreme Court, in no manner, refer to the patents as determining the rights of the parties but they found at least three distinct grounds upon which, as above stated, the complainant was not entitled to relief. It is, therefore, entirely clear that this court is without jurisdiction as there is no federal question here. We quote from the opinion of Justice Peckham, in Fowler et al. vs. Lamson et al., 164 U. S., 252.

"It has also been frequently decided that to give this court jurisdiction on writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause and that it was decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment, as rendered, could not have been given without deciding it."

Justice Fuller, in Hammond vs. Johnston, 142 U. S., 78, states the doctrine a little differently.

"It is well settled that where the Supreme Court of a state decides a federal question in rendering a judgment and also decides against the plaintiff in error upon an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

These cases are in accordance with a long line of decisions too numerous to make reference necessary.

As above stated, the state court decided against the plaintiff in error on three distinct grounds each of which was sufficient to have maintained the judgment and none of which involved a federal question. The rights of the defendants were confirmed to them in the bed of the lake by virtue of the contracts and acts of the parties themselves, and not by a construction placed by the court upon the original grants contained in the patents from the United States.

2nd. The existence and construction of the patents of the United States under which the respective parties derived their title would not, in our opinion, for two reasons, give this court jurisdiction of this case even if such construction had been the only question in the case.

1st. The only question of construction of the patents which could be involved would be the extent of ownership of the respective parties in the bed of Lake Angeline. The extent and nature of such ownership is a matter of policy for the states themselves to determine and one in which the general government is not concerned.

St. Louis vs. Rutz, 138 U. S., 226.
Hadin vs. Jordan, 140 U. S., 371.

2d. The question of construction was not raised in the manner required by this court. Such a question as we understand it, must be specially set up and the right claimed thereunder in the state court.

Texas & Pac. Ry. Co. vs. Southern Pac. Ry. Co., 137 U. S. 48.
Leeper vs. Texas, 139 U. S., 462.
Mo. Pac. Ry. Co. vs. Fitzgerald, 160 U. S., 556, 575.

Since the preparation of the foregoing brief, F. O. Clark, solicitor for complainant, has delivered to us a copy of his printed application for a writ of error in this case. We think the opinion of the Supreme Court of Michigan completely answers all of Mr. Clark's arguments, but we have concluded to refer briefly to some of them.

We have already stated that the court decided that the Cleveland Iron Mining Company owned the land in question, not by virtue of its United States patents, but by reason of the contracts and acts of the parties themselves. In fact, while the court does not expressly so decide, the inference is clear that the court was of the opinion that under Ice Co. vs. Ice Co.,

supra, the bed of this lake was originally subject to apportionment among the riparian owners in some equitable manner and that, had that been the only question in the case, the contention of the complainant that it owned land north of the section line as appurtenant to its grant would have been sustained. In other words, so far as they decided anything upon this point, they held with complainant.

Notwithstanding this, Mr. Clark, on page six of his application, makes a quotation from the opinion of the Supreme Court from which he claims that they decided adversely to his title under his patents. The quotation made by him reads as follows:

"The Cleveland Iron Mining Company claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity."

Mr. Clark's contention shows that he misconceives altogether what the Supreme Court said. A conveyance bounded upon a lake, does not convey title, in the ordinary sense, to the submerged land. The nature of ownership in the bed of a lake of an abutting proprietor is well stated in Ice Co. vs. Ice Co., supra:

"The shore proprietor takes by virtue of shore ownership. His interest in the bed of the stream he acquires as appurtenant to the grant and the extent of that interest depends upon his frontage, and the form, length and breadth of the body of water upon what he abuts."

What the Supreme Court meant in the quotation to which Mr. Clark takes exception (as is clearly apparent when it is

examined in the light of the whole opinion), was that Mr. Clark did not contend that he owned any specific piece of property north of the section line, but only that he had interests therein which should be set off to him in severalty. If the Lake Angeline Company had owned any specific portion of the bed of the lake which was capable of being measured—set off by metes and bounds—Mr. Clark would have brought an action in ejectment; he would not have filed a bill in chancery. He filed his bill on the theory that he had an interest there which was not capable of being set off by a surveyor but only by a decree of the court or by agreement of the parties, and Mr. Clark, in the original brief which he filed, cited in support of that proposition and his right to maintain this bill in equity the following cases:

Lincoln vs. Davis, 53 Mich., 389.
Jones vs. Lee, 77 Mich., 40.
Hardin vs. Jordan, 140 U. S., 402.

Mr. Clark, in the brief he filed in the Supreme Court of Michigan, quoted from the opinion of Hardin vs. Jordan, the following:

"If there should arise any dispute between the plaintiff and other riparian owners of land situate on the margin of the lake as to the convergence of the side lines of plaintiff's land in the lake, it can be disposed of by the parties themselves by a resort to equity or to such other mode of procedure as may be proper."

Following the above quotation, Mr. Clark, in his brief of argument in the Supreme Court of Michigan in our case, used the following language:

"Thus, it has been held * * * that there could be

no proper division of an inland lake * * * by undertaking to divide it *fillum aquae*; * * * but that it should be by convergent lines to a common, equitable center, equitably determined in a court of equity, as closely as it is possible to be done under the circumstances but which can never be done to absolute accuracy."

Elsewhere Mr. Clark in the same brief in contending that the Exhibit A, which he had attached to his bill in equity furnished one mode of equitable apportionment of the bed of the lake, used the following language:

"There can be no question that such division (referring to a division by lines converging from the shore to the center) would be absolutely accurate if the inland lake was exactly round; but as suggested by Justice Campbell (Lincoln vs. Davis, 53 Mich.) the shore is usually irregular in form; therefore a division can only be arrived at in a manner most reasonable, by equitable apportionment under the direction of the court.

"Now, as to this case, Lake Angeline is about as broad as long were it not for its arms lying east, west and south. If we were to cut off these arms, dividing the balance into segments * * * and apportion the arms separately by the 'river rule' by a line drawn from the main body of the lake through the center of each arm, thus apportioning the arms separately to the abutting owners and the main body by segments adjacent to the holdings of the owners upon the main body of the lake, we would undoubtedly come to the most equitable mode of division possible."

It was because of this argument and reasoning of Mr. Clark's that the Supreme Court of Michigan in this case said that, upon complainant's theory, it owned no land which was measurable by metes and bounds and that whatever it owned could only be determined by agreement or the decree of a

court. As heretofore stated, this was complainant's theory, that it needed the aid of a court of equity to equitably apportion to it its property in the bed of the lake. The court was stating complainant's theory, not deciding the question.

Mr. Clark also devotes considerable space to the construction placed by the Supreme Court of Michigan upon one of its statutes, restricting the alienation, by corporations, of their mining property, requiring a vote of stockholders, etc. This court has repeatedly held that it will adopt the construction which the state courts have placed upon their own statutes; therefore it will not quarrel with the construction which the Supreme Court of Michigan placed upon this statute. What the court in its opinion said was this:

"Do the contract, settling the boundary line and acquiescence therein and acts done thereunder estop complainant to now assert a different line? The rule is settled by the decisions of this court that where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and parties have, for any considerable time, recognized them, they will be upheld though title by adverse possession could not be maintained. *Joyce vs. Williams, 26 Mich., 332; Smith vs. Hamilton, 22 Mich., 433; Jones vs. Pashby, 67 Mich., 459.*

"According to the testimony on the part of the plaintiff, there was a dispute as to the boundary line. * * * If his testimony be true, and for this purpose the company must stand by its own testimony, there was a dispute and it was settled by the agreement; complainant recognized it for nearly five years and saw all these expenditures made by the defendants without protest.

"Complainant however, invokes the doctrine that the title to the land cannot rest on estoppel on account of the statute

of frauds, and that a vote of three-fifths of the entire stock of the company is essential, under the statute, to convey title. The obvious reply to the first proposition is that it is also established that the statute of frauds does not apply to boundary lines and that the doctrine of estoppel will be applied to the voluntary adjustment of disputed boundaries. *Hayes vs. Livingstone, 34 Mich., 384-397.*

"Under the theory of complainant, corporations could not settle boundaries without a meeting of the stockholders called to pass upon the alienation of its lands and the doctrine of estoppel could never be applied to a boundary line between corporations or between a corporation and an individual. So, too, in reply to the second proposition, it may be said that the statute does not apply to the voluntary adjustment of these lines, but to alienation by deed of conveyance. Complainant was not alienating, dividing or selling any of its real estate within the language of the statute. *Howard's Annotated Statutes, Sec. 4052.*

"Alienation means, in law, a transfer of title by conveyance.

"Webster's dictionary, Century dictionary."

We wish specially to refer to IV and V parts of Mr. Clark's application for the writ of error. The argument presented under division IV is completely answered by what we have already said and by the quotation from the opinion of the Supreme Court. There was no alienation or conveyance of land in the ordinary sense, but an adjustment and settlement of a boundary question. The rights of abutting owners in the bed of an irregular inland lake are certainly difficult of adjustment and it is a case eminently proper for settlement by the parties themselves.

Hardin vs. Jordan, supra.
Jones vs. Lee, supra.

By the settlement the Lake Angeline Company got prop-

erty below the section line which, under the common law rule of riparian rights, clearly belonged to the Cleveland Iron Mining Company. It mined out the ore, of which there was a large quantity, and filled up this space with refuse and rock. In the adjustment of boundaries it got a piece of land at that time believed to be of more value than what it was giving up.

Respectfully submitted,

HOYT, DUSTIN & KELLEY,

and

GEO. HAYDEN,

Attorneys for The Cleveland Iron Mining Co.

A. C. DUSTIN, of Counsel.

THE

Supreme Court of the United States.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
APPELLANT,

vs.

THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY,
APPELLEES.

Now comes the Lake Superior Iron Company, one of the defendants in error in this cause, by its counsel, and moves the court for an order requiring the clerk of the Supreme Court of the State of Michigan to certify to this court copies of the briefs filed on the part of said Pittsburgh and Lake Angeline Iron Company in said Supreme Court of Michigan, upon the hearing of this cause before that court, to be used as a part of the record in this cause upon the motion to dismiss the writ of error therein, in order that this court may ascertain from such briefs whether any such question was raised and decided by said Supreme Court of Michigan in this cause, and in such manner, as to confer jurisdiction upon this court to review said decision.

This motion is founded upon the record of this cause and upon the motion to dismiss the writ of error therein, and the affidavit thereto attached now on file therein, from which the following facts appear:

This case was brought in the Circuit Court for the County of Marquette, State of Michigan, in equity, by the complainant against the two defendants, who, with the the complainant, owned all the land abutting on a small inland lake in Marquette County, Michigan, known as Lake Angeline. The object of the bill was to obtain a decree of the court apportioning among the shore owners the bed of Lake Angeline, from which the water had been drained by arrangement between the three parties. The Circuit Court found that by agreement between the parties, and their subsequent acts, in reliance on such agreement, they had apportioned said lake bed among themselves, and that the complainant was estopped to claim any portion of the lake bed in opposition to the partition so made. The complainant appealed to the Supreme Court of the State of Michigan and the decree was affirmed on the same grounds as stated by the lower court.

The complainant has obtained the allowance of a writ of error from this court to review the said decision of the Supreme Court of Michigan. It is claimed by the complainant in support of its appeal that the decision of the Supreme Court of Michigan was based upon a holding by that court that "complainant owned no specific piece of land north of the section line (that is, in the lake bed), even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement, or the decree of a court of equity."

It is claimed that this is a federal question, arising under the laws of the United States, as to what rights in the bed

of a meandered lake are conveyed by patent of the United States, granting lands abutting on the lake, and therefore this court has jurisdiction to review the decision.

Motions have been entered in behalf of the defendants to dismiss the writ of error for the reason that no federal questions were raised before the Supreme Court of Michigan by the appellant, which were decided by the court adversely to it, and that this court has no jurisdiction under the provisions of Section 709 of the Revised Statutes to review said decision.

Complainant, by its pleadings in the case, made no specific claim of right, title, or interest in the lake bed by virtue of its patents, or any law of the United States, but claimed rights therein as appurtenant to its ownership of the abutting land.

Briefs were filed with the Supreme Court of Michigan by the complainant's counsel, and served upon defendant's counsel in accordance with the rules of the Supreme Court of Michigan. It was not urged or claimed by complainant's counsel in such briefs that it obtained any rights in the lake bed by virtue of any law of the United States. On the contrary, it was insisted by complainant before said court, in its briefs, that rights and titles in the lake bed accrued to the abutting owners as appurtenant to their riparian ownership under and by virtue of the laws of the State of Michigan; that the ownership of the lake bed at the time of the issue of the patents was in the State of Michigan, and that the rights of complainant, as well as of the defendant, in the lake bed depended entirely upon the law of the State of Michigan. The briefs of complainant's counsel are required, so that this court can see that no claim was made by the complainant before the Supreme Court of Michigan under any law of the United States upon which a decision was made adverse to such claim,

and that the decision of what is now claimed to be a federal question, if any such decision was made by the Supreme Court of Michigan, was exactly in accordance with the contention of complainant's counsel upon the hearing before that court.

Dated May 15th, A. D. 1899.

DAN H. BALL,
Attorney for Appellee,
The Lake Superior Iron Company

THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE PITTSBURGH AND LAKE ANGELINE IRON COMPANY, APPELLANT, *v.* THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY, APPELLEES.	*No.* 778.

Memorandum Brief on Application for Order to Send Up Certified Copies of Briefs.

This case was brought in the Circuit Court for the County of Marquette, State of Michigan, in equity, by the complainant against the two defendants, who, with the complainant, owned all the land abutting on a small inland lake in Marquette County, Michigan, known as Lake Angeline. The object of the bill was to obtain a decree of the court apportioning among the shore owners the bed of Lake Angeline, from which the water had been drained by arrangement between the three parties. The Circuit Court found that by agreement between the parties, and their subsequent acts, in reliance on such agreement,

they had apportioned said lake bed among themselves, and that the complainant was estopped to claim any portion of the lake bed in opposition to the partition so made. The complainant appealed to the Supreme Court of the State of Michigan, and the decree was affirmed on the same grounds as stated by the lower court.

The complainant has obtained the allowance of a writ of error from this court to review the said decision of the Supreme Court of Michigan. It is claimed by the complainant in support of its appeal that the decision of the Supreme Court of Michigan was based upon a holding by that court that "complainant owned no specific piece of land north of the section line (that is, in the lake bed), even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement, or the decree of a court of equity."

It is claimed that this is a federal question, arising under the laws of the United States, as to what rights in the bed of a meandered lake are conveyed by patent of the United States, granting lands abutting on the lake, and therefore this court has jurisdiction to review the decision.

I have entered a motion in behalf of the Lake Superior Iron Company to dismiss the writ of error for the reason that no federal questions were raised before the Supreme Court by the appellant which were decided by the court adversely to it, and that this court has no jurisdiction under the provisions of Section 709 of the Revised Statutes to review said decision. A similar motion has also been entered on behalf of the Cleveland Iron Mining Company.

Complainant, by its pleadings in the case, made no specific claim of right, title, or interest in and by virtue

of its patents or any law of the United States, but claimed rights in the lake bed as appurtenant to its ownership of the abutting land.

Rule 40 of the Supreme Court of Michigan requires the parties to file printed briefs and provides that "the brief of a party bringing a cause into this court shall contain a clear and concise statement of the facts of the case distinct from argument, and on the errors upon which he relies, the questions involved, and the manner in which they are raised."

Rule 41 provides that "two copies of the appellant's brief shall be served upon the appellee."

Rule 42 provides that "twelve copies of all briefs shall be filed at least forty-eight hours before the case has been placed on call."

It has been repeatedly held by the Supreme Court of Michigan that only such points as counsel make and rely on for reversal in their original brief will be considered by the court in disposing of the case, even though additional errors may be assigned and orally argued.

Black *v.* Dawson, 82 Michigan, 485.

Lynch *v.* Craney, 95 Michigan, 200.

Graves *v.* Battle Creek, 95 Michigan, 266.

Briefs were filed and served by complainant's counsel in accordance with these rules. It was not urged or claimed by complainant's counsel in such briefs that it obtained any rights in the lake bed by virtue of its patents from the United States, or by virtue of any law of the United States. On the contrary, it was insisted by complainant before the Supreme Court of Michigan, in its briefs, that rights and titles in the lake bed accrued to the abutting owners as appurtenant to their riparian ownership under and by virtue of the laws of the State of

Michigan ; that the ownership of the lake bed at the time of the issue of the patents was in the State of Michigan, and that the rights of the complainant, as well as of the defendant, in the lake bed depended entirely upon the law of the State of Michigan. This is shown by the affidavit which is filed, together with the motion to dismiss, and the brief filed in support of said motion, and the extracts from the briefs of counsel, by which the claims mentioned are made, are set forth in the brief. Such extracts appear on pages 7 to 14 of my brief filed with the motion to dismiss.

I think this court should have before it in an authoritative form the briefs of complainant's counsel which were filed in the Supreme Court of Michigan, setting forth the claims made by them, so that this court can see not only that the claim now urged as arising under the laws of the United States, was not so urged, raised, or presented to the Supreme Court of Michigan, but that it was expressly urged and argued before that court that the question was arising solely under the laws of the State of Michigan, and therefore that no right, title, or immunity was claimed by the appellant before the Supreme Court of Michigan, in which the decision was adverse to such claim.

I submit that the clerk of the Supreme Court of Michigan should be directed to certify to this court copies of the briefs filed by the complainant upon the presentation of its case before the Supreme Court of Michigan, and ask for an order to that effect.

DAN H. BALL,
Attorney for Lake Superior Iron Co.

No. 260.
Brf. of Hoyt for D. C.

OFFICE SUPREME COURT
FILED
FEB 19 1900
JAMES H. McKENNEY

SUPREME COURT

Filed Feb. 19, 1900.

OF THE UNITED STATES.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
vs.
THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY,
Defendants in Error.

October Term, 1899.

No. 260.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Brief for Defendant in Error, The Cleveland Iron Mining Company.

GEO. HAYDEN, *Solicitor.*

J. H. HOYT, *of Counsel.*

THE FORMAN-BARRETT-HATCH CO., CLEVELAND O.

Supreme Court of the United States.

Case No. 17363.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY, Plaintiff in Error, vs. THE CLEVELAND IRON MINING COMPANY, AND THE LAKE SUPERIOR IRON COMPANY, Defendants in Error.	October Term, 1899, No. 260.

Brief for Defendant in Error, The Cleveland Iron Mining Company.

The so-called statement of facts contained in the brief of Solicitors for plaintiff in error contains the statement of but one fact properly set forth—the ownership of lands surrounding Lake Angeline. Beyond this it is at most an argument and a very partial one, in which partial statements are so confused with argument that the entire statement is impossible of use on which to present the case to this court. We therefore feel justified in fully stating the facts.

STATEMENT OF FACTS.

THE TERRITORY IN DISPUTE.

The land in dispute was formerly the bed of Lake Angeline and the three parties owned all the land surrounding the lake. The patent under which defendant, the Cleveland Iron Mining Co., claims was obtained from the government, July 21, 1850, and was recorded before patents for the lands of either of the others were issued or recorded.

The patent under which the Cleveland Company holds its title contained the following description:

"The east half of Section ten (10) and the west half of Section eleven (11) in Township forty-seven (47) N., of Range twenty-seven (27) W., containing 555 acres and 15-100 of an acre, according to the official plat, etc." The subsequent patents under which the other parties hold title to these lands lying upon the shore of this lake, describe the parcels as lots.

While mining operations had been carried on continuously by the respective companies on their respective lands for more than twenty years last past, no iron ore was known to exist in the bed of the lake or under its waters, until the winter of 1886-7, when Mr. D. H. Bacon, then agent of the Cleveland Company, by diamond drill borings conducted through the ice on the North side of the lake, discovered iron ore (R. pp. 186-188). This discovery is not within territory now claimed by complainant.

At the time of this discovery, Mr. Bacon was congratulated upon the find by the Superintendent of the complainant company, who expressed doubt that the ore there discovered extended "across the line into

their property." Mr. Kidder, agent of the complainant company, shortly afterwards, in discussing the discovery, "expressed the same fear." (R. p. 186).

No ore was at that time known to exist in that territory under or adjacent to the south line of the section where it crosses the southeast arm of the lake, the subsequent discovery and development of which in its various stages gave rise to the various acts, contracts, agreements and conduct of the parties shown in this record and finally to the suit itself. Ore was discovered South of the line by complainant in 1890.

In 1881, the Cleveland Company was assessed for taxes upon "the East half of Section ten (10)" and paid taxes upon that description. In 1895 it was assessed upon the "east half of Section ten (10)" and paid taxes upon that description. These are the only tax statements put in evidence and their force is uncontradicted by any other tax record or history.

EVIDENCE REGARDING ANCIENT CLAIMS OF POSSESSION OR OWNERSHIP

is somewhat meagre on both sides. Mr. Bacon testified that in the year 1880 or 1881 he visited the locality about the South quarter-post of Section ten in company with Mr. J. C. Morse, then the Cleveland Company's agent, for the purpose of making a general inspection of the company's property. At this time he was met by Mr. Kidder, then agent of the complainant company, who pointed out to Mr. Bacon that the Cleveland Company owned a small corner of land on the South line of the lake at the South quarter-post and also pointed out the South boundary line of the Cleveland Company's property running eastward across the Southeast arm of Lake Angeline and referred to that line where it

crosses the lake and extending eastward, as the Cleveland Company's South boundary line. (R. pp. 185, 186, 188.)

Mr. Bacon soon afterward became agent of the Cleveland Company and remained so until 1887 and during that time never heard of any claim made by complainant company that it owned any portion of the land North of the South line of ten in the bed of the lake. (R. p. 187.)

The testimony of Mr. Bacon is contradicted by Mr. Kidder, who testified that many years ago Mr. Morse came to him and asked him to sign some kind of a letter of recommendation that the Lake Angeline Company should quit claim to the Cleveland Company everything North of the South line of Section ten on condition that the Cleveland would deed to the Lake Angeline everything South of that line. (R. p. 108). He also denied all recollection of the conversation testified to by Mr. Bacon. (R. p. 109).

The President of the Cleveland Iron Mining Company at this time, Mr. Samuel L. Mather, who remained such down to the time of his death, died in 1890 or 1891 (R. p. 201).

In the year 1890, complainant company, believing there was iron ore of some kind a short distance South of the South line of Section ten under and adjacent to the Southeast arm of the lake, began sinking a shaft and struck ore of good quality in 1891.

Walters, R. p. 117.

Kidder, R. pp. 98-99.

After striking this ore complainant company ran several drifts upon it, to the westward, to the Southeast and to the Northwest in order to develop the extent of it.

The location of this shaft and direction of it, also the direction of the several drifts running therefrom and as they have subsequently been continued to the date of the hearing, are shown upon maps "F" and "G."

It was not until the summer of 1892 that Mr. Kidder and Mr. Walters discovered that the ore body found by them in the bed of the lake in this Southeast arm would very likely continue Northwest and go over the South line of Section ten into the territory North of it in the locality where the line crosses the Southeast arm of Lake Angeline.

Kidder, R. pp. 98, 105.

Walters, p. 133.

The maps "F" and "G" will show that the shaft of complainant company mentioned above was run to the Southwest and that many of the drifts are run a long way towards the Southeast and towards the West and Northwest a considerable distance South of the South line of Section ten. These maps do not, of course, show the condition of things in the summer of 1892 when the development work by complainant company had practically but just begun and when the discovery was first made by Kidder and Walters that their ore body probably would go over the line.

The discovery of iron ore of a good quality such as that discovered by complainant by means of the "east end" shaft was very important to complainant. A mine theretofore unsuspected had been discovered upon which great hopes might be built of future value. The existence of that ore was known in 1890 or in 1889. It was found to be of considerable extent in the year 1891 in a location under the waters of the Southeast arm of the lake. For the first time complainant company was confronted with the important question

what effect the waters of the lake would have upon the mine. With the certainty of an iron mine under the waters of the lake near the South line of Section ten complainant was confronted with the necessity of settling the question whether the doctrine of riparian rights should be left open to the Cleveland Company upon which it might claim a portion of the lake bed South of the Section line opposite to its lot seven.

In March, 1892, the pumping contract was formulated between the three companies. That pumping contract was necessarily preceded by a negotiation by which its terms were agreed to before the draft was made, but the negotiation appears in evidence only in detached incidents. These consist for the most part of (1) Exhibits 2 and 3 (R. pp. 174-175) the first being a request signed by Thomas Walters, directed to Mr. Mills asking him to sign a certain agreement, and also the agreement itself which was enclosed, both dated March 2, 1892: (2) the testimony of Kidder and Mills as to what consideration led to the division of the expense of pumping the lake as between the complainant company and the defendants. These exhibits are set forth at length hereafter.

The testimony of Mr. Kidder and Mr. Mills regarding the division of expense as affecting their respective boundaries will be referred to among the facts pertaining particularly to the pumping contract. The special attention of the court is asked, however, to the fact that the pumping contract, dated March 17th, 1892, executed by the Cleveland Company on the same day (R. pp. 88-93) and preceded by one day by the petition of the three companies to the Common Council of the city of Ispheming for consent to pump the lake (R. p. 178) preceded by several months the dis-

covery made by Kidder and Walters in the summer of 1892 above referred to, that the ore found by them South of the line would probably extend over that line to the North.

THE PUMPING CONTRACT.

The complainant's bill sets up the pumping contract (R. p. 10). The contract is not, however, set forth in terms but is merely referred to.

At the hearing, complainant's counsel offered that contract in evidence and it is marked as complainant's Exhibit "I" (R. p. 88 to 93).

Mr. Kidder, prior to the making of that contract, was anxious to get rid of the water in the Southeast arm of the lake. Portions of the negotiations were carried on between Mills, Kidder and Mr. Mather, President of the Cleveland Company. Who conducted the negotiations in behalf of the Lake Superior Iron Company does not appear. The letter of James Laughlin, Jr., President of the complainant company, dated Aug. 18, 1893, and appearing as defendant's Exhibit 12 (p. 181) indicates that the president of complainant company himself conducted negotiations in behalf of his company with the other two companies.

The important circumstances involved in that contract necessarily presuppose considerable negotiation between the heads of the various companies before these terms were finally settled upon, and *that an agreement was had between them.*

In the order of time, the first writing found in the evidence leading to that contract is Exhibit 3, sent by Superintendent Walters to Agent Mills enclosed in Exhibit 2, both of which are here given in full:

DEFENDANT'S EXHIBIT 2.

Ishpeming, Mich., March 2, 1892.

F. P. Mills, Esq.

Dear Sir:—Enclosed herewith find two copies of agreement. Will you kindly sign and return one, and oblige.

THOS. WALTERS.

DEFENDANT'S EXHIBIT 3.

Ishpeming, Mich., March 2, 1892.

Cleveland Iron Mining Co., Ishpeming, Mich.

Gentlemen:—Providing you close by March 15th, 1892, a contract with B. C. Howell, to drain Lake Angeline for $33,000 in full, and only on completion of the work, we will pay you one-fifth (1-5) of such cost, less one-fifth (1-5) the then estimated value of such plant as becomes yours at that time.

We also, by reason of not entering a joint contract to keep the lake bed empty, agree that we will construct a flume to take away all drainage from our side of the section line, and maintain it until the ore on such land, situated under the lake bed, is exhausted. After that you may take the flume without charge, and care for it as you see proper.

Yours truly,

PITTSBURGH & LAKE ANGELINE IRON CO.,

By Thos. Walters, Supt.

Conditions accepted.

CLEVELAND IRON MINING COMPANY,

By F. P. Mills, Agt.

Following this the three companies requested permission of the city of Ishpeming to pump Lake Angeline. The lake lies within the city limits and all

the parties must have understood that the city had a right to grant or refuse permission to pump this lake; that the reasons for draining so large a body of water were of some consequence to the city as well as to the parties interested.

The records of the city of Ishpeming comprising the original petition signed by officers of the three companies and the action of the Common Council of the city thereon appear in defendant's exhibit 11 (R. p. 178) and are as follows:

DEFENDANT'S EXHIBIT 11.

March 16th, 1892.

A regular meeting of the Common Council of the city of Ishpeming, Michigan, held in the council chamber on Wednesday evening, March 16th, A. D. 1892.

Meeting called to order at 7:30 p. m. by Mayor Donahoe.

There were present Mayor Donahoe, Aldermen Routhier, Eggan, Johnston, Jones, Fitzpatrick, McNamara, Samuelson, Beerling, Swanson, Persons and Buzzo. Absent—Aldermen Malloy and Anderson.

Alderman Jones introduced the following ordinance:

AN ORDINANCE

Granting permission to THE CLEVELAND IRON MINING COMPANY, THE LAKE SUPERIOR IRON COMPANY and THE PITTSBURGH & LAKE ANGELINE IRON COMPANY to pump out and permanently drain Lake Angeline.

Whereas, The Cleveland Iron Mining Company, The Lake Superior Iron Company, and The Pittsburgh

& Lake Angeline Iron Company by mesne conveyances from the original patentees of the United States, severally own all the land surrounding Lake Angeline which said lake is situated within the corporate limits of the city of Ishpeming, and therefore, exclusively, severally own the bed of said lake, as follows, to-wit: The said The Cleveland Iron Mining Company all that portion of the bed of said lake lying east of the center line of section ten (10) as projected through said lake and north of the south line of section ten (10) and section eleven (11), township forty-seven (47) north of Range twenty-seven (27) west, as so projected: The Lake Superior Iron Company, all that portion of the bed of said lake lying west of center line of said section ten (10) and north of the south line of section ten (10) as projected through said lake: The Pittsburgh & Lake Angeline Iron Company all that portion of the bed of said lake lying south of the south line of said section ten (10) as projected through said lake and the surface right of lot six (6) of said section ten (10) as acquired by them from The Lake Superior Iron Company.

And Whereas, the said three companies desire to pump the water out of said lake, and to permanently drain the same, in order to severally conduct mining operations on the respective portions of said lake bed belonging to each, and desire the formal permission and authority of the Common Council of the city of Ishpeming so to do, said lake lying and being within the corporate limits of said city:

Therefore, be it ordained by the Common Council of the city of Ishpeming.

Section First. That consent, permission and authority are hereby given and granted and duly

vested in the said The Cleveland Iron Mining Company, the said The Lake Superior Iron Company, the said The Pittsburgh & Lake Angeline Iron Company and their respective successors and assigns, to pump out and drain away the water of the said Lake Angeline and, thereafter, to permanently drain the same and to maintain and operate the necessary machinery and pumping apparatus and appliances so to do, provided that the water pumped out of said lake and permanently drained therefrom shall be carried away through the present outlet of said lake into Carp River.

Section Second. This ordinance shall take effect from and after the passage thereof.

Section Third. All ordinances or parts of ordinances or resolutions heretofore made or ordained or passed which are inconsistent with the provisions of this ordinance, are hereby repealed.

Approved by the Common Council of the city of Ishpeming on March 16, 1892.

T. F. DONAHOE, Mayor.
A. SANDBERG, Recorder.
March 16, 1892.

To His Honor, the Mayor, and the Common Council of the city of Ishpeming, Mich:

We do ask your honorable body to pass favorably the above ordinance.

CLEVELAND IRON MINING COMPANY,
By F. P. Mills, Agt.
LAKE SUPERIOR IRON COMPANY,
By C. H. Hall, Agt.
P. & L. A. I. Co.
Thos Walters, Supt.

Alderman Routhier moved the adoption of the foregoing ordinance. Supported by Alderman Eggan, the vote by yeas and nays were as follows:

Yeas—Mayor Donahoe, Alderman Routhier, Eggan, Johnston, Jones, Fitzpatrick, McNamara, Samuelson, Beerling, Swanson, Persons and Buzzo.

Nays—None.

The motion was then declared unanimously carried.

A. SANDBERG, Recorder.

That the language of this petition has been formulated as a part of the agreement is evident not only from the considerations mentioned, the important consequences involved, but by the fact that the pumping agreement is dated on the day following the passage of this resolution and on the same day is executed by the Cleveland Iron Mining Company at Cleveland, Ohio.

The pumping contract is as follows (R. pp. 88-93):

This Agreement, made this 17th day of March, A. D., 1892, by and between The Cleveland Iron Mining Company, first party, The Lake Superior Iron Company, second party, and The Pittsburgh & Lake Angeline Iron Company, third party, all corporations organized under the laws of the State of Michigan.

WITNESSETH:

First—That whereas, the three parties to this agreement severally own all the land surrounding Lake Angeline, in the County of Marquette, State of Michgan, and, iron ore having been discovered under the bed of said lake, it has become necessary to pump out the water of said lake, and permanently thereafter drain the bed thereof, in order that each of the parties hereto

may economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to.

Second—And, whereas, one B. C. Howell, prior to the date of this contract had a large pump suitable for such work and proposed to said first party to contract to pump out said lake and to sell said pump and necessary appliances, all for the sum of thirty-three thousand dollars ($33,000) provided he could begin operations immediately while firm ice remained in said lake, so as to furnish the necessary support for placing the proper timber work in position: and whereas, said first party after communicating with said second and third parties and getting their approval, has entered into a contract with the said Howell to pump out the water of said lake and to purchase said pumping apparatus and appliances for said sum, thus making a large saving in the cost thereof, and, whereas the cost of the continuous drainage of the bed of said lake, after the water thereof is pumped out, is now impossible of ascertainment, and the parties hereto are desirous of fixing the proper proportion of expense, both of the purchase of said pumping apparatus and of said pumping out of said lake and of the cost of the continuous or permanent drainage of the bed thereafter, to be borne by each, the same being for the mutual benefit of all.

Now, therefore, the parties hereto, in consideration of the premises and mutual considerations received by each from each, the receipt of which is hereby respectively acknowledged, hereby agree as follows:

SAID FIRST PARTY AGREES:

First—To bear and pay eight-fifteenths (8-15) of

the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake, under the arrangement with the said Howell, to-wit: the sum of seventeen thousand, six hundred dollars ($17,600) and eight-fifteenths (8-15) of any additional cost which may be necessarily incurred in the premises, and will also bear and pay one-fifth (1-5) of the value of said pump and appliances, after the lake is pumped out, which one-fifth (1-5) thereof is to be deducted, as hereinafter provided, from the amount to be paid by said third party.

Second—After said lake is once pumped out by said Howell, to maintain and operate the said pumping apparatus and plant for the continuous and permanent drainage of the bed of said lake, advancing all necessary expenses for such maintainment, operation and repairs, and, at the end of each calendar year, to pay and bear such a proportion of the cost thereof during the year preceding, as the total number of tons of ore mined and produced by said first party from that portion of the said lake bed belonging to it, during said year, bears to the total number of tons of iron produced and mined during such year by said first and second parties jointly from the bed of said lake, and further, to bear and pay two-thirds (2-3) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

SAID SECOND PARTY AGREES:

First—To bear and pay four-fifteenth (4-15) of the entire cost of the purchase of said pump and apparatus, and of the pumping out of said lake under the arrangement with the said Howell, to-wit: the sum of eight thousand eight hundred dollars, ($8,800), and four-

fifteenths (4-15) of any additional cost which may be necessarily incurred in the premises.

Second—To bear and pay to said first party, on settlement to be made at the end of each calendar year, such a proportion of the entire cost of maintaining, operating and repairing the plant for the permanent drainage of said lake-bed as the total number of tons of iron ore produced and mined by said second party, from that portion of the lake-bed owned by it, during such year, bears to the total number of tons of iron ore produced and mined by said first party and said second party from the entire lake-bed during such year, and also to bear and pay one-third (1-3) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

SAID THIRD PARTY AGREES:

First—To bear and pay three-fifteenth (3-15) of the entire cost of the account to be paid to the said Howell under the arrangement of said first party with him, to-wit: three-fifteenths (3-15) of the said thirty-three thousand dollars ($33,000) namely, the sum of six thousand six hundred dollars ($6,600), and three-fifteenths (3-15) of any additional cost which may be necessarily incurred in the premises, less one-fifth (1-5) of the value of said pump and appliances purchased from the said Howell under the arrangement with him, the value of which is to be estimated as soon as the first drainage of said lake is completed.

Second—To erect and maintain a proper and sufficient flume, so constructed above the present water level of Lake Angeline, as to divert and carry away all the surface water or other surface drainage which would otherwise come into the present bed of said lake

from all the land lying above the present water level of said lake, and south of the south line of section ten (10) as projected through said lake, and also to run into said flume any and all water which the said third party may pump from its mine or mines; which said flume said third party agrees to maintain and keep in repair and in successful operation, diverting such drainage from the bed of said lake, until the iron ore to which said third party is entitled, lying on, in, or under the portion of the bed of said lake lying south of said south line of said section is mined and exhausted, and then, to turn over said flume in good repair to the said first and second parties hereto without charge, and to allow them, thereafter, to operate and maintain the same for the purpose of continuing said drainage, giving the employees of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, allowing them to make such alterations in said flume, and in the direction of the same, as may be necessary to successfully accomplish such drainage.

IT IS MUTUALLY AGREED, BY AND BETWEEN THE PARTIES HERETO:

First—That each of the parties hereto will respectively pay on demand, their proper proportion of the amounts due from each, as aforesaid, under the arrangement with the said Howell, when and as called for by W. G. Mather, of Cleveland, Ohio, who is hereby appointed the trustee of all the parties to this agreement to collect the amount due from each, and to pay the same to said Howell in accordaace with the terms of his contract.

Second—That, in case of any dispute arising be-

tween the parties hereto, either under this contract or in regard to their joint operations in or about the drainage of the bed of said lake, all such matters of dispute shall be settled by five (5) arbitrators, one (1) to be chosen by each of the parties hereto and the other two (2) to be selected by the arbitrators so chosen, an award in writing of any three (3) of said arbitrators to be binding and final upon the parties hereto. In case of a dispute, however, between two (2) only of the parties to this agreement, but three (3) arbitrators shall be chosen, one (1) by each of said disputing parties, and the other by the two (2) so chosen, and the award in writing of any two so chosen shall be binding and final upon the parties between whom such dispute has arisen.

Any party to this agreement desiring such arbitration shall have the right to the appointment of arbitrators in the manner above provided, by serving a ten days' written notice of its intention to so arbitrate on the other party or parties to this agreement, who shall each respectively within the time limited in such notice, select its arbitrators, and, in the event of its failure so to do, then the party desiring said arbitration shall have the right to select an arbitrator in lieu of the one or ones failed to be appointed by the other party or parties, and an award in writing of a majority of the arbitrators so chosen shall be final and binding upon the parties to such arbitration.

Third—This agreement shall extend to and be binding upon the successors, assigns and grantees of the respective parties hereto, precisely as if said respective successors, assigns and grantees had been specially designated herein.

It is mutually agreed by and between the first and second parties hereto as follows:

First—That the said first party, through its proper agent or employes shall keep an accurate and exact account of the cost of operating and maintaining said pumping plant and appliances for the permanent drainage of the bed of said lake, which accounts shall, at all reasonable times be open to the inspection of the said second party through its agents or employes, and that, before any improvement or other machinery or appliances are purchased for the purpose of the permanent drainage of said lake, the second party shall be consulted concerning the purpose thereof, and its approval obtained; and on or before the tenth day of January of each calendar year, a written statement of the cost of maintaining and operating said drainage plant and appliances for the preceding year, shall be sent to said second party by the first party, together with a full, complete and accurate statement of the total number of tons of iron ore mined during the preceding year from the bed of Lake Angeline by said first party, and, on or before the said tenth day of January of each such year, the said second party shall send to the said first party, a full, complete and accurate statement of the number of tons of iron ore mined or produced by said second party from the bed of Lake Angeline during the year preceding.

And the said second party agrees, within ten days from the receipt by it of said account, to pay to the said first party its proper proportion of the cost of maintaining and operating said permanent pumping and drainage plant, as above provided, and also, on demand, one-third (1-3) of the cost of such other and additional appliances and apparatus as may have been

previously agreed on by the first and second parties hereto as above provided. Provided, however, that if, when said accounts for the permanent drainage during any year are rendered to said second party, said second party is willing, for the succeeding year, to undertake the permanent drainage of said Lake Angeline, at a less cost than that procured by the said first party for the year last preceding, the said second party shall thereupon have the right, during the succeeding year, to take possession of said permanent pumping and drainage plant, together with all appliances and operate and maintain the same itself, permanently draining the said lake bed during such year advancing all the cost thereof, in which event the said second party shall keep and render the accounts above required to be kept by the said first party, and the said first party, within the time above limited, after the expiration of any such year, shall pay to the second party its proportion of the cost of such permanent drainage, in the manner and within the time above provided, and if, at the end of any such year, the said first party is willing to undertake the permanent drainage of said lake for the next succeeding year, at a cost less than that incurred by the said second party, it shall have the right to do so, as above provided, it being understood that either, at the end of any year, shall have the right to operate said permanent drainage plant for the next succeeding year, provided it is willing to guarantee to do so at a less cost than that incurred by the other party during the year next preceding.

If desired by either said first or said second party, the respective statements of the amount of ore respectively mined and produced by each in each year from the respective portions of the bed of Lake Angeline

owned by each party, shall be under oath and sworn to by the agent or employes of each party having knowledge of the facts.

In witness whereof, the parties hereto have caused these presents to be duly executed in triplicate, by their respective officers, and their respective corporate seals to be attached, as of the day and year first above written.

THE CLEVELAND IRON MINING COMPANY,
By Wm. G. Mather, President.

(Corporate seal.)

Attest: Fred A. Morse, Secretary.

Signed, sealed and delivered in presence of L. G. Madison, Frank B. White.

THE LAKE SUPERIOR IRON COMPANY,
By G. W. R. Matteson, President.

(Corporate seal.)

Attest: A. C. Tenney, Secretary.

W. B. Bosson, Chas. Hall Adams..

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY. By Jas. Laughlin, Jr., President.

(Corporate seal.)

Attest: W. G. Pollock, Secretary.

W. C. Quinn, William F. Robb, A. C. Dustin, C. A. Judson.

STATE OF OHIO, } ss.
Cuyahoga County, }

Before me, Alton C. Dustin, a commissioner of deeds, for State of Michigan, residing in the City of Cleveland, County of Cuyahoga, and State of Ohio, personally appeared Wm. G. Mather, President, and Fred A. Morse, Secretary of the Cleveland Iron Mining

Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they duly executed the foregoing instrument, for and on behalf of said corporation duly authorized thereto, and that the same is the free act and deed of said corporation, and the free act and deed of themselves as such officers.

In witness whereof, I have hereunto set my hand and official seal, this 17th day of March, 1892.

(Seal.) ALTON C. DUSTIN,
Commissioner of Deeds for Michigan,
Residing in Cleveland, Ohio.

STATE OF MASSACHUSETTS, } ss.
County of Suffolk. }

Before me, Charles Hall Adams, a commissioner of deeds for the State of Michigan, residing in the City of Boston, County of Suffolk, and State of Massachusetts, personally appeared G. W. R. Matteson, President, and A. C. Tenney, Secretary of the Lake Superior Iron Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of such corporation, and the free act and deed of themselves as such officers.

In witness whereof, I have hereunto set my hand and official seal, this sixth day of July, A. D., 1892.

(Seal.) CHAS. HALL ADAMS,
Commissioner of Deeds for Michigan,
Residing in Boston, Mass.

STATE OF PENNSYLVANIA, }
Allegheny County. } ss.

Before me, William F. Robb, a commissioner of deeds for the State of Michigan, residing in the city of Pittsburg, County of Allegheny, and State of Pennsylvania, personally appeared James Laughlin, Jr., President of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such President, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such President.

In witness whereof, I have hereunto set my hand and official seal, this twentieth day of August, A. D., 1892.

(Seal.) WILLIAM F. ROBB,
Commisioner of Deeds for Michigan,
Residing in Pittsburg, Pa.

STATE OF OHIO, }
Cuyahoga County, } ss.

Before me, Alton C. Dustin, a commissioner of deeds for the State of Michigan, residing in the city of Cleveland, County of Cuyahoga, and State of Ohio, personally appeared Wm. G. Pollock, Secretary of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such Secretary, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such Secretary.

In witness whereof, I have hereunto set my hand and official seal, this twenty-second day of August, A. D., 1892.

(Seal.) ALTON C. DUSTIN,
Commissioner of Deeds for Michigan,
Residing in Cleveland, Ohio.

Immediately following the making of this contract and in pursuance with the recitals in the preliminary portion thereof, the contract was made with B. C. Howell to pump the lake in consideration of the sum of thirty-three thousand dollars ($33,000). That contract appears as defendant's exhibit 4 on p. 230. It is dated on the very same day as the contract between the three companies.

Pursuant to these contracts the water of this considerable lake was all pumped out between March 17, 1892, and December 24, 1892. (R. p. 175, defendants' exhibit 5). The cost of pumping divided between the three companies ran above the original price of thirty-three thousand dollars by reason of other circumstances, the very large proportion of the increase falling solely upon the two defendants.

The total cost of drainage, both that chargeable under the Howell contract to the three companies and that paid only by the two companies upon the annual account divided between them to keep the lake permanently drained was seventy-six thousand four hundred and eighty-eight dollars and thirty-eight cents ($76,488.38), up to January 1, 1897. Of this large sum the Cleveland Company paid $44,149.68; the Lake Superior Iron Company, $17,147.18; and the Pittsburgh & Lake Angeline Iron Company, $7,601.38, with an additional unapportioned sum of $7,590.14, to be paid by the two

defendants alone on account of continued drainage. (R. p. 220.)

The situation referred to the comparatively shallow depth of water in the southeast arm, the slope from the mouth of this arm downward to the bed of the lake and the fact that water flowing into the main body of the lake bed from the southeast arm would reach every part of the bed, and the conditions upon which the complainant company stipulated for paying but a small part of the first pumping cost and obtained immunity from all cost of continuous drainage is best shown by the following exhibits:

(1) The hydrographic map, defendants' exhibit 38. (R. p. 228).

(2) The petition to the Common Council, Exhibit No. 11. (R. p. 178).

(3) Defendants' exhibit three.

(4) The letter of the president of complainant company, dated August 18, 1893; disclaiming any interest in the lake bed.

(5) Defendant's exhibit 8a, inserted in the record at page 229.

(6) Defendant's exhibit 28. A large map on the scale of 50 feet to the inch, showing the depth of water in the southeast arm and the growing depth of water from the mouth toward the center of the lake. (R. p. 218).

The southeast arm of the lake contains shallow water, but the higher ground in this part of the bed fell rapidly away from the mouth of this arm toward the center of the lake, so that if the waters were lowered in the lake sufficiently to drain the southeast arm, there might still be many feet of water in the deeper portions of the lake bed.

A cross section of the lake on the north and south center line of 10 (Defendants' exhibit "8a"); (R. p. 229) a photograph of this arm to its mouth, showing across the mouth a trestle bridge, (Defendants' exhibit 25); (R. p. 216), and a photograph of the bed of the lake looking east, (Defendants' exhibit 5a) (R. p. 276), these are confirmatory of the hydrographic map and cross section on the north and south line of 10, and show that the downward slope of the lake bed from the mouth of the southeast arm to the deepest portion of the lake bed, is gradual, continuous and unobstructed, so that a pump located at the deepest portion of the lake at the commencement would drain not only the southeast arm, but every other portion of the lake.

The lake was fed, not only by springs in its bottom, but by two streams, one entering through the eastern arm, and the other through the southeast arm, over complainant's territory; these streams are shown to best advantage in defendants' exhibit 28. Rec. p. 218.

The most casual survey of the situation will show that with the southeast arm drained, and with the water which might enter deeper portions of the lake bed through this arm from the stream, beyond taken care of and turned from the lake bed, the arm itself would be freed from water, unless the lake bed should be permitted to fill with water and overflow into the arm. (See Mills R. p. 194).

Ownerships of the land having been assumed as they were in all these communications and in the pumping contract, nothing could be clearer than that complainant company performed its full duty by the other owners in assisting in the first drainage and thereafter taking care of the water entering the lake bed from its own territory, south of that boundary line.

This continuous pumping, even after that lake bed had been pumped dry by Howell, became, and now is, as was evidently foreseen at the time of making the pumping contract, a great burden upon the two defendants owning the territory comprised in that lake bed north of the south line of 10.

Though the Howell contract was performed near the end of 1892, the continuous pumping at the sole cost of the two defendants has continued without interruption since that time, costing the two defendants the following annual sums: from August 1st, to December 31st, 1893, $977.82; from January 1st to December 31st, 1894, $7570.58; from January 1st to December 31st, 1895, $4306.09; January 1st to December 1st, 1896, $3763.12.

An expense to get the mud out of the bottom of the lake after the water was pumped out was incurred by the two defendants, of $20,227.53. (R. pp. 136-137 138-139.)

This pumping, to keep the lake bed dry, is still going on at the sole expense of the two defendants, and is not only necessary to prevent the water rising in the lake high enough to enter the southeast arm, but also to prevent the workings of the Cleveland Company from filling with water through openings which since the lake was pumped dry, have been made through the surface. (R. p. 138.)

Stipulations of the pumping contract, of which the petition to the Common Council of the city of Ishpeming may well be a part, and defendants exhibit 3, (R. p. 175); taken in connection with the hydrography of the lake itself, are conclusive evidence without resort to oral explanation of the fact that the proportions of expenditure by the several companies; the im-

munity given the complainant company from continuous pumping; the stipulations of the two defendants, by which they are bound to complainant company at their own sole cost and expense to keep that lake bed forever dry, and by which also, each is bound to the other to keep that lake bed dry, are based upon the ownership explicitly recognized and defined in the pumping contract by which complainant's north line terminates with, and is bound by the south line of section 10. On no other theory would it be possible that complainant company had no interest in keeping the deeper portions of the lake bed extending towards its center, beyond the mouth of the southeast arm continuously pumped.

Mr. Kidder, in his testimony, undertook to claim that a fold or ridge of diorite rock through the center of the lake affected or controlled the apportionment of the original cost of pumping, and should afford complainant company immunity from continuous pumping thereafter, as fixed in the contract.

This testimony of Mr. Kidder, in the first place, is inadmissible as an effort to contradict the terms of the written contract.

But even if admissible, the testimony is made ridiculous by the hydrography of the lake and the contour of this lake bed. But the seal of discredit is finally put upon the claim by Mr. Kidder's own testimony on cross-examination:

"Q. (By Mr. Hanchette.) When you made this pumping contract, you then understood and acted upon the understanding also, that your premises stopped with the north section line of section 10? A. Yes. Q. The terms of the contract were finally settled in view of that opinion which you held in re-

gard to your property rights? A. That is right." (R. p. 103.)

The pump now used by the defendant companies in carrying out their annual burden under the contract keeping the lake bed dry, is now actually located at a point in the lake bed, nearly opposite the mouth of the southeast arm and nearly, if not quite, within the dotted lines reaching out into the center of the lake shown on the map, exhibit "A" (Rec. p. 14) attached to the bill of complaint, which includes the territory sued for by complainant; Joplin R. p. 206 top, 217 and map exhibit 28 (R. p. 218) containing the land marks referred to by the witness.

The conformation of the lake bed to that point from the mouth of the southeast arm is a continuous slope downward, and complainant is suing in this case for territory, the preservation of which from encroachment of water and mud it refused to take part in, on the ground that it had no interest therein.

Should the continuous pumping provided for in the pumping contract be suspended, the lake would refill with this result: it would destroy the mine of the defendant Cleveland Company in the lake bed, both on the north and south side of the lake.

ACTS OF THE PARTIES SUBSEQUENT TO THE PUMPING CONTRACT.

The pumping of the lake, the expenditures thereon, the breaking through of the surface of the mines of the Cleveland Company under the dry lake bed and the physical conditions involved in the pumping contract directly, have been referred to.

Attention has also been called to the fact that some months after the three companies had agreed to

the terms of the pumping contract, and after pumping of water pursuant thereto had been begun by Howell, the complainant company, through Mr. Kidder and Mr. Walters, became aware of the fact that the mine discovered by them in the southeast arm of the lake was tending to the northwest in such a manner that the deposit was likely to extend upon the Cleveland Company's side of section line.

Mr. Kidder and Mr. Walters called the attention of Mr. Mills, agent of the Cleveland Company, to this fact, and the Cleveland Company which had already begun a drill hole from its north side mine southward, to reach the territory adjacent to the south line, where this deposit might be found, obtained permission from the complainant company to enter the mine of the complainant south of the line, and run drill holes northward into its own territory. (R. p. 133.)

Five drill holes were thus bored by the Cleveland Company to this end, and ore found on the north side of the line. These borings are shown on map 28. (R. p. 218.) Five drill holes were also put down from the surface.

At a latter date the Cleveland Company, in the year 1894, commenced running a drift at great expense from the north side to reach this probable deposit on the south side for the purpose of determining whether it had any value. (R. p. 192.)

While the existence of ore had been found in this locality by the numerous borings, the real value of the deposit could not by such means be determined. To determine the value it was necessary to run drifts and cross-cuts after reaching the ore body, and this latter work was very expensive. (R. pp. 192-193.) The complainant company itself, after its borings, previous to

1890, to determine the existence of ore in the southeast arm, had sunk a shaft to reach the ore and had drifted therein before it was able to determine whether ore actually found was of sufficient extent to warrant opening a mine. (R. p. 121-122.)

At the time the Cleveland Company began its drift, Mr. Walters, in conversation with Mr. Mills on the probable value of so expensive a proceeding to the Cleveland Company, suggested to Mr. Mills that though the ore ran over the line into Cleveland Company territory, there could not possibly be enough of it to pay for so expensive a development, as the long sock drift proposed—that there would not be over 200,000 tons, and proposed that the Cleveland Company let complainant company have that ore which could be cheaply taken out to the south through the opening made by the latter south of the line, the latter to pay royalty thereon. (R. pp. 133-134.) It thus appeared that even as late as 1893, at the time of this conversation, the officers of complainant company did not suppose the ore body existing in large quantities south of the line was of any considerable extent north of the line. THERE WAS NOT ENOUGH TO COVET.

From the very time in 1892, when the borings by the Cleveland Company were commenced to test this south side territory down to September, 1896, but two months before this suit was commenced, the engineers and superintendents of the complainant and the Cleveland Company, respectively, made numerous maps of their respective operations on each side of the south section line of 10, and that section line was marked on all their maps as a boundary line. (See Exhibits G and H.) Map at p. 195, Map Ex. 30, R. p. 219, Ex. 21, p. 61. Such maps were frequently made and exchanged

with the other company by each company, so that each could keep track of the other.

In 1894 the workmen of complainant company in mining south of the boundary line unwittingly crossed the line and took ore from the north side near meander corner 16. On discovery thereof by Mr. Kidder he caused a map to be made and wrote to Mr. Mills of the Cleveland Company acknowledging the trespass, its locality and extent, and signifying his willingness to settle for it. A map of the trespass was also made by Mr. Jopling from the data furnished by Mr. Kidder and from Mr. Kidder's letter and measurements and the map showing the boundary line and location of the trespass, a settlement was had between them (R. p. 181; maps exhibit 15, p. 59; letters of Kidder and Mills p. 181).

On January 30th, 1896, Mr. Mills discovered a trespass committed by his people across the same boundary line into the premises of complainant company under the same lake bed and in nearly the same locality as the trespass of 1894. He informed Mr. Kidder of this trespass and furnished him maps showing the locality of the same as short distance west of the trespass of 1894. (R. p. 194; letter of Mills exhibit No. 20, p. 184; Maps Ex. Nos. 22, p. 194).

Defendants exhibit 28 (R. p. 218) shows the relative location of both these trespasses. Some time following this latter trespass and the month, probably, of February, 1896, Mr Kidder and Mr. Mills, and perhaps other officers of the respective companies visited the locality under this boundary line and again fixed nails in the timber structure to further mark the boundary line. (Mills p. 194). Bradt 64.

In the summer of 1896 complainant company

wishing a permanent lease of a right of way for a railroad north of the section boundary line furnished maps of a survey of that line to the officers of the Cleveland Company for the purpose mentioned. (R. pp. 207-208 maps at pp. 219-195-219).

The railroad track in question had been built in the winter of 1895-6 under oral permission from the Cleveland Company given to Mr. Kidder so to do. The grades and tracks on this line were not completed by this company until May, 1896. R. p. 115-206.

Defendant's exhibit 28, R. p. 218 shows correctly and distinctly the direction of this railroad line crossing a portion of the territory now disputed in this case. Complainant company under its grant of permission so to do still occupies this territory and uses this track. R. pp. 207-219-368.

When applying for a formal lease for this right of way in the summer of 1896, at the time he furnished his maps, Mr Bradt understood his company were occupying this ground already under an informal lease. Subsequently Mr. Bradt to make some corrections in the map already furnished by him of this railroad track, requested its return from the Engineer of the Cleveland Company in letters expressly setting forth the purpose of the maps so furnished by him. (See letter, exhibit No. 31-33, p. 219.) In the month of September, 1896, Mr. Jopling and Mr. Kidder acting for their respective companies had a conversation about the mining of ore on the boundary line under the lake bed at the place in question and in this conversation the boundary line was distinctly recognized and the mining operations of the respective companies regulated thereby. A map of the situation was made by Mr. Jopling which more fully explains the significance of

their conversation. (See R. p. 209 Map exhibits Nos. 24 and 28).

In the meantime during the years following the summer of 1892, the complainant company conducted its mining operations in the bed of the lake on the south side of the boundary line on the assumption that shore ownership on this lake had nothing more to do with property rights in the bed thereof.

Opposite the shore line of the Cleveland Company's upland where it extends into the southwest quarter of the southeast quarter of section 10, the Cleveland Company by the rule invoked in this case by complainant and by the method of ascertaining shore ownership admitted by complainant's, the river rule—the Cleveland Company would have owned a portion of the lake bed south of the south line of section 10 extending southwestward into that arm of the lake to the central thread of that arm through which a stream once ran into the main body. That ownership is best indicated by the triangle drawn upon the map, defendants exhibit 28, (R. p. 218), one of the angles of which is the section line.

Complainant company believing it owned all south of section line 10 has mined out all ore in that triangle, and it was all of the finest quality. The openings in that part of its mine left after the mining of ore had been either caved in or filled with rock and the mine structures there have thus been destroyed; neither can the openings be entered, as complainant company has filled these openings with rock from the surface during a series of years and they are now inaccessible. (R. p. 54-56-79.)

The locality of the filled ground is referred to by the engineer Bradt (R. p. 79) and is shown upon the

map, exhibit "G." In the ore body under this boundary line within this very triangle, both the trespasses of 1894 by complainant company and that of 1896 by defendant Cleveland Company were committed and settled for.

The significance afforded by this triangle is best shown on defendant's map 28 (R. p. 218) to which all the data from the other maps have been transposed to a scale.

How much ore complainant company has mined from the territory comprised within this triangle is not known and can never be known to any disinterested witness. No cross sections of openings were ever made by the engineer and the cubic contents of that drift can only be guessed at. (R. p. 56.) There is no offer in the bill of complaint to restore to the defendant the Cleveland Company, its property (by the riparian rights rule invoked by complainant) thus taken from it.

No evidence is left for a disinterested witness to determine the extent and value of the right which the Cleveland Company may once have had within the limits of that triangle.

The hazards of mining explorations and mining operations conducted by the Cleveland Company toward and into the deposit of ore lying along this south boundary line from the time they began boring in 1892, until the summer of 1896 are well illustrated by the evidence.

The borings from the complainant's side of the boundary line were expensive and discovered the existence of ore, but without valuable result. The borings from the north side through many hundred feet of rock to this deposit discovered ore, but without result. Even when the Cleveland Company began its long

drift through the solid rock to reach this south side, the chances seemed against a fortunate result and the experienced miner, Captain Walters, so expressed himself to Mr. Mills. Nevertheless the Cleveland Company conducted continuous operations from that time forward to determine the value of that property and the existence of a mine worth working.

Into the long rock drift run from the north side, costing for some of its distance at least from $15 to $17 per lineal foot, an electric tram road with rails and ties and wire and motor complete was introduced and carried forward with the work of development.

When the ore body was reached many drifts and levels were run in various directions—one-half of them in rock for the further purpose of development and all these drifts and levels aggregating 3,000 feet in length were in the interest of development continuously conducted for the purpose of making a mine as much as to determine the value of the deposit that mining might thereafter be conducted.

It was not until these hazardous expenditures and developments had been carried on to the summer of 1896, that great value was finally shown in the existence of a large body of ore in this territory. Then it was that the engineer and superintendent of the complainant company, who visited the workings, were surprised by the showing of ore and first learned how really valuable the work of the Cleveland Company had shown this deposit to be. (Jopling, p. 207).

On election day in the month of November following Mr. Kidder posted a notice directed to Mr. Mather, President of the Cleveland Company, giving him the first intimation that the complainant company intended to make the claim made in this suit. (Jopling p. 216).

In mailing this notice, Mr. Kidder remarked to Mr. Jopling that he thought "Mr. Mather will be very much surprised when he receives that notice!" And Mr. Mather certainly had warrant to be surprised.

ARGUMENT.

The defendant, The Cleveland Iron Mining Company, defends its rights to the possession forever of the territory in dispute for the following reasons:

(1) The patent under which the defendant, The Cleveland Iron Mining Company, claims title gave it title to the whole east half of section ten (10) to the south line thereof and complainant is barred from objecting to this claim because it has treated a body of water covering a portion of that territory as of no value and joined in the draining of the water as if the land was merely swampy ground valuable only when reclaimed and made dry land.

(2) Because it has title by adverse possession for more than fifteen (15) years.

(3) Because the south section line of ten (10) was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.

(4) Because the pumping contract is an estoppel by deed against the complainant from now asserting title.

(5) Because the complainant is estopped by matter in pais from asserting title to the land.

(6) Because the complainant is estopped by its laches.

(7) Because as a tenant of a portion of the

premises in dispute complainant is estopped to deny defendant's title.

I.

HAD THE CLEVELAND IRON MINING COMPANY TITLE TO THE LAND IN DISPUTE BY A PATENT?

The patent under which the Cleveland Company holds its title describes the parcel in question as the east half of section ten. It is not described as a fractional. To be sure the patent gives the number of acres in the east half of this section as five hundred and fifty-five and a fraction. At the time of this patent the government was the owner of all the remaining lands surrounding the lake, the patent to the defendant Cleveland Company antedating by one year or more all other conveyances. When other conveyances of the remaining lands upon the lake were issued, the parcels described in them bounding the lake were conveyed as fractional subdivisions or lots.

The question therefore arises whether the government did not intend by the use of the language mentioned in the patent of the east half of section ten, to convey the whole of it to the subdivision lines extending across the lake, regardless of the meandered lines of the lake.

It is a principle of the construction of conveyances by the government, that where the government has not reserved any right or interest that might pass by the grant, or done any act showing intention of reservation, one must construe the grant most favorably to the grantee, and that the government intended all that might pass by it.

Middleton vs. Pritchard, 3 Scam. 510;
Hardin vs. Jordan, 140 U. S. 371.

It is held that the statement of the number of acres contained in a patent does not limit the conveyance. It is intended only to enable the government to fix a price for the conveyance; and the same cases held that waters bounding the property conveyed are not reserved to the United States; that the meandered lines of the water body abutting the upland conveyed have no force in themselves to limit the grant.

Brown's Lessees vs. Clements, 3 How. 650, 665;
Ice Co. vs. Ice Co., 102 Mich., 228;
Hardin vs. Jordan, supra.

The rule of shore ownership, giving to the shore proprietors the ownership of soil under the water to the center of the stream or water body appurtenant thereto, is based on a rule of intention.

It has never been held in any of the cases that it would be incompetent for the government to grant to any individual the soil under a bed of water covering a subdivision of land, if such were the intention.

See also:

Moran vs. Lezotte, 54 Mich., 83, 88;
Keyser vs. Sutherland, 59 Mich., 462.

It is true that this lake was both meandered and surveyed and that the patent refers to the survey. It is also true that in ordinary cases the courts construe such a patent as conveying to the shore owner ownership of the soil under the waters to the central thread. This construction is always given to a conveyance of land upon a water body in cases where no difference in the language of the patent of one subdivision is found to exist as against conveyances of the other lands upon the same water body; in other words, where there is no such difference in the language of the several patents to several portions of land

upon the water body as indicate a difference of intention regarding the one as against the other.

The question submitted is whether or not, with the patent under which the Cleveland Company holds antedating all other conveyances of lands about this lake, and with a distinctive difference in the language of this patent, the Cleveland Company did not acquire under that patent, by a construction warranted by the rule that conveyance should be construed most favorably to the grantee, the entire subdivision, whether or not under water.

It is evident that when the Cleveland Company claimed, as it did as early as 1880, to own the entire subdivision down to the south line thereof, though a portion of the land was under water, the claim was based upon the language of the patent.

An important consideration involved in the construction by the courts to a patent of land upon a meandered body of water, is that the object of the construction is to carry into effect a supposed intention on the part of the government to give to each shore proprietor access to navigable water opposite and appurtenant to this shore line.

> Bay City &c. Co. vs. Industrial Works, 28 Mich., 182.

and that this construction for this purpose is favored because the government does not intend in making the grant to reserve any portion of land under the water.

The reason thus given for the construction of such grants by the government presupposes the existence of such a body of water as may be available as such; that the shore proprietor will have no use for the soil beneath the water; that he will have use only for the water itself, whether for navigation, fisheries, cutting

of ice, or other like purposes. The actual use of the soil under the water has seldom if ever formed a bone of contention.

Now, if adjacent shore proprietors treat any meandered body of water covering a portion of their respective premises, as if it were merely an obstruction to the use of the soil—as a mere swamp or wet place, to be drained for the purpose of reclaiming the land beneath—what right would such proprietors have to insist upon a construction never before insisted on, and which construction, if the waters had been such as they are really treated by the shore proprietors, would never have been made for their benefit?

In this case the complainant treated the water body in question as a mere noxious swamp, of no value as water for any purpose, and joined in getting rid of it to reclaim the dry land beneath, upon the understanding that the section line was a boundary—that the section line was the boundary exactly the same as if no water body had been meandered, and the land surrounding it had all been conveyed as upland. Ought not the complainant to be barred from claiming in its favor at this late day a construction of the government patent under which the defendant holds, which construction has only been indulged by the courts on the theory that the water body was a benefit to the shore owner, that a patent to the land abutting the water should be so construed as giving an uncertain boundary beneath the waters adjacent, only because such construction would be the most favorable to the grantee?

The Cleveland Company certainly claimed title to this land in the year 1880, and that claim was unquestionably based upon the language of this patent.

It appears from Mr. Bacon's testimony that not only did the Cleveland Company claim title to the south section line produced across the lake, but that the agent of complainant company in charge of its property acceded to, acquiesced in that claim, and in fact pointed out the section line to Mr. Bacon as the south boundary line of the Cleveland Company's property.

If in fact Mr. Kidder's statement is to be taken in preference to that of Mr. Bacon upon this point, and if it is true therefore, taking Mr. Kidder's version, that sometime during these early years Mr. Morse, then agent of the Cleveland Company, requested Mr. Kidder to procure from the complainant company a quit claim deed to the Cleveland Company of all the land in the east half of ten north of the south line in the body of the lake, in consideration of a quit claim by the Cleveland Company to the Angeline Company of all the land in the lake bed south of that line, this does not help the case of complainant, for it would indicate clearly a disputed boundary, giving rise to the necessity of the boundary settlement which followed in later years.

II.

HAD NOT THE CLEVELAND COMPANY THE TITLE TO THE TERRITORY IN DISPUTE BY ADVERSE POSSESSION?

In the year 1880 the Cleveland Company paid taxes upon the east half of section ten, assessed and levied upon that section, following exactly the language of the patent. In 1895 the same company paid taxes upon the same section, assessed and levied as before. There is no evidence in the record to dispute or vary

the tax history of this parcel as having been continuous between the years mentioned.

Upon the testimony of Mr. Bacon the complainant company, acting through Mr. Kidder, pointed out to the former in the year 1880 or 1881, the south line of section ten produced across the arm of the lake as the south boundary line of defendant's property. It was done at a time when the Cleveland Company's agent was inspecting his property line. The circumstance cited fully in the statement of facts herein, amounted to a claim of possession by the defendant Cleveland Company, and an acquiescence therein by the complainant company.

With this acquiescence therein by the complainant company, in defendant's ownership and claims, it is not necessary to show continuous acts of possession for fifteen years to give the Cleveland Company title upon the theory of adverse possession. Possession once begun by acquiescence of the other party, is presumed to have continued, unless the contrary is shown.

But more than this, during all the years following the claim of possession in 1880, and even before that, down to the commencement of this suit, the Cleveland Company was in actual possession and working mines in the upland of this east half of section ten.

Had the Cleveland Company been an actual trespasser during this time, it could not have contended by its actual possession of a portion of the premises for constructive possession of other portions. But the patent under which it claimed title to the whole subdivision down to the south line, undoubtedly gave the Cleveland Company a color of title at least.

Miller vs. Davis, 106 Mich., 301:
Fuller vs. Swensberg, 106 Mich., 305.

A party holding possession, open, notorious, adverse and continuous, under a claim of title, (a claim of ownership admitted and acquiesced in meets all these conditions), need not have actual physical possession of every part of the subdivision claimed by him under that title, but his possession of a part may be construed to be possession of the whole.

Millerd vs. Reeves, 1 Mich., 107.

But however this may be, the act of possession in 1880 constituting a claim of possession and acquiescence therein, was a sufficient actual possession at that time; and the payment of taxes and claim of title since that time are sufficient to warrant the presumption of continuous adverse possession, no other facts appearing to the contrary.

Murray vs. Hudson, 65 Mich., 670.

While the decision of this question one way or the other is not at all necessary in this suit, it is submitted that as against the bill of complaint this objection is alone sufficient to bar a decree in complainant's favor.

III.

THE SOUTH BOUNDARY LINE OF SECTION TEN BETWEEN THE EAST HALF OF THE SECTION AND THE PROPERTY OF COMPLAINANT IN SECTION FIFTEEN, WAS AGREED UPON BETWEEN THE PARTIES AS A BOUNDARY, AND THE AGREEMENT HAS BEEN FOLLOWED BY MANY SUCCESSIVE ACTS OF THE PARTIES ON THE FAITH THEREOF, BY WHICH THE CLEVELAND COMPANY CANNOT

BE RESTORED TO THE CONDITION IT WOULD HAVE BEEN IN IF THE CONTRACT HAD NOT BEEN MADE AND ACTED UPON.

In discussing this proposition let it be assumed that the south line of section ten was not made the southern boundary of the east half of that section by the grant itself. Let it also be assumed that the Cleveland Company at no time held actual adverse possession of the property in dispute for a period of fifteen years. Yet we confidently submit the circumstances, acts and agreements of the parties clearly establish such an agreement as stated above.

If the Cleveland Iron Mining Company claimed title under its patent, and if the complainant company did not acquiesce therein but claimed a line in the lake in some undefined, unascertained place, on the theory of shore ownership, then the circumstance is presented of a disputed boundary—a claim on one side of title under the patent, and a denial of the claim on the other. It is certainly true of the condition of this boundary in 1880 and 1881 either that the Cleveland Company claimed title under its patent which was acquiesced in by the complainant, or it claimed title but the claim was not acquiesced in by the complainant, or the Cleveland Company made no claim whatever regarding the line, but the complainant company claimed the title to be in the lake in an undetermined place: or both companies recognized the uncertainty of that line, and the request for an interchange of quitclaim deeds was made by the Cleveland Company and refused by the complainant company, as was testified to by Mr. Kidder. It is a matter of absolute indifference which of these was the truth, in view of what followed.

In view of the tremendous operations in the district in question since the year 1890, the great transformation of physical conditions, the entire good faith of the Cleveland Company in bringing about these changes and spending vast sums in the hazardous enterprise of showing value in the territory in question, in putting in peril its great mine and works under the bed of the lake outside of the disputed territory, in surrendering without complaint land it might claim on the shore ownership theory south of the section line in undertaking the permanent obligation regarding permanent drainage, all these upon the faith of the recognition by the complainant of the south line of the section as the boundary, and upon its numerous acts and declarations to the same effect, the court will in our opinion find a reason for preventing the complainant, who has suffered all this hazardous expenditure and all these great physical changes in conditions, from now obtaining any benefit therefrom when they have finally turned out to be profitable.

Prior to the year 1890 the territory in question adjacent to the south line of section ten on both sides of the line was not supposed to possess any certain value. It was land located in a mining district, but unknown, and might be worthless. In the year men tioned, suspecting ore to exist in that locality, complainant began sinking a shaft. In May, 1891, ore was struck in this shaft. (Walters, p. 116). By the middle of March, 1892, complainant had drifted upon the ore there found a distance of sixty-five feet northwest from the shaft. (R. p. 122). On the 8th of February preceding, complainant had begun running its drifts from the shaft in an opposite direction that is towards the southeast. (R. p. 122). By its

operations complainant had ascertained prior to the month of March, 1892, that its discovery was one of value. (R. p. 122).

While the ore had been proven to exist when it was reached in May, 1891, and though practically continuous exploration was continued by complainant in that locality up to the time of the making of the pumping contract, and while greater value in the deposit was proven as time and exploration thus progressed, yet at the time of the making of the contract in March, 1892, complainant did not then think the ore body discovered by it extended far enough northwest to go over the section line.

Kidder, p. 101.

Walters, p. 133.

On the discovery of this valuable deposit it became of overwhelming importance to complainant company that the boundary line should be settled beyond dispute.

Mr. Kidder certainly at one time claims he believed his company owned the land north of the section line in the bed of the lake. If so, he knew the line was undefined, uncertain, difficult of ascertainment.

It is presumable that Mr. Kidder's president and board of directors were equally informed with himself on this subject, and were equally exercised with him upon the question of a boundary to which this valuable discovery so nearly approached.

By the rule of shore ownership under which Mr. Kidder says he once claimed, the shore owner owns that portion of the bed of the water body opposite and appurtenant to the shore, to the center of the stream. The lines of ownership are drawn at right angles with

the thread of the stream from the shore front, regardless of the extent of territory back of the shore front.

Clark vs. Campau, 19 Mich., 328.

By this rule a triangle of territory would be formed in the bed of the south arm of the lake south of the section line, which—if Mr. Kidder's testimony is correct—he must have believed the Cleveland Company owned.

The lines showing this triangle are drawn upon map Exhibit 28, and were referred to by several witnesses in the testimony.

Unless the Cleveland Company acquired title to the south line by its patent or by adverse possession, it certainly did own the territory comprised in that triangle at one time, on the theory of shore ownership involved in this bill.

Whatever may be said in this case about the conduct of Kidder as affected by the case of Clute vs. Fisher, his own testimony shows he was left in doubt even after he was advised about the case. It does not appear whether he advised with his company about that case. If he did, it is not probable that the astute lawyers of a corporation with such great interests at stake could have misapprehended the dictum in that case for a rule of property. It must be clear from any view which can possibly be taken of the situation that the urgent need of a settlement beyond dispute of the boundary between the property of the complainant and the Cleveland Company appealed to the complainant company.

If the complainant could have made Clute vs. Fisher a rule of property, it would doubtless have gladly done so on the discovery of the mine in the southeast arm, for the ore there found extended close

to if it did not actually enter the triangle, so that under Clute vs. Fisher that triangle would have belonged to complainants.

At that time no ore was known to exist north of the line. Complainant therefore could afford to receive the decision of Clute vs. Fisher with favor, and hope it might never be reversed. But did complainant company believe that if a valuable mine was shown to exist within that triangle, the Cleveland Company would likewise accept Clute vs. Fisher as of binding force?

We all know the rule referred to so many times in the brief of complainant's counsel—Clute vs. Fisher—was a dictum, unsupported by the body of law in this State previous to that time; that it was expressly renounced in 1888 in the case of Wilson vs. Hoffman; that it never was the law of the United States courts, or of this court.

Is it not too much to suppose therefore that the president of complainant company in Pittsburgh, Pennsylvania, while he may have hugged the hope that the decision would be accepted by the Cleveland Company, hesitated to trust thereto?

The development about to be undertaken was too important to risk a doubt.

At the time of the discovery in question complainant was confronted with the presence of the waters of this lake for the first time as a menace to mining operations.

All the parties to the pumping contract were mining men of great experience, aware of the hazards of mining operations, the great expense involved in exploration, the uncertainty attending such expenditures, the exercise of discretion, care and skill in such

an enterprise, the great sums of money involved, the rapid changes in values affected thereby, together with the great physical changes effected in surface conditions—all these were well known.

No one of the shore owners in question could drain this lake without the consent of the others, neither could divert the water or pollute it without common consent, neither could so conduct mining operations beneath the bed of the lake in any place in such manner or take out ore to such extent in mining upward toward the surface in the bed, as to hazard the caving in of any part of the lake bed, thus not only destroying the mine beneath but disturbing and diverging the waters reaching to other shores.

Any arrangement by which the great expense that would be incurred in the pumping of this lake, by which such expense could be apportioned between several shore owners, and by which the subsequent operations of each in caving the surface were to be guided, appealed irresistibly to the common sense of each of the three parties as requiring a definition of boundary that could never be thereafter questioned.

No officer or agent of complainant company could plead ignorance of such a necessity—or an immediate recognition or repudiation of the section line as a boundary.

Every doubt possible to be entertained at that time—and the situation was so important that the complainant must have been compelled to search the entire field for the discovery of a possible doubt—must have impelled its officers not only in their own behalf to save their own rights and preserve to them the fruits of their own enterprise, hazards, expenditures and discovery, but to protect their brethren engaged in similar

enterprises, whose necessities, in view of so great an enterprise to be undertaken, were equally great, to say all they had to say at that time or never.

Pertinent to the situation is the opinion of the Supreme Court of the United States in the case of Twin Lick Oil Co. vs. Marbury, 91 U. S., 592-3. In that case the court estopped the complaining party from litigating the title to land valuable only for mining purposes, who had stood by and witnessed its development by a defendant claiming title:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow, and that which would to-day sell for one thousand dollars as its fair value, may by the natural changes of a week or the energy and courage of a desperate enterprise in the same time, be made to yield that much every day. The injustice therefore is obvious of permitting one holding the right to assert an ownership in such property, to voluntarily await the event and then decide when the danger which is over has been at the risk of another, to come in and share the profits. While a much longer time might be allowed to assert this right in regard to real estate, whose value is fixed, on which no outlay is made for improvements, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

The changes effected under the pumping contract on the faith of the boundary line therein set forth, upon the apportionment of expense and burdens therein

imposed, based on the boundary there stated, strikingly illustrates the above opinion applied to the mining of iron ore and the circumstances confronting the plaintiff in March, 1892.

It was better at that time for each of the parties in this suit to assume a boundary line between their properties which might possibly be wrong, rather than leave it unsettled or involved in any possible doubt.

Complainant seems to have been the proposing party in effecting the pumping contract.

The execution of that contract must necessarily have been preceded by many negotiations, and the final agreement between the parties, before the terms of the contract, or any paper relating thereto were actually formulated.

The letter of complainant's superintendent, Capt. Walters, (Exhibit 2, R. p. 174), enclosing therein with a request for its signature a proposal as to certain of the terms to be embodied in a pumping contract (Exhibit 3, R. p. 175), is the first written item of evidence in point of time in the negotiation, though that paper must have been discussed and settled by complainant company before it was written.

The letter of Mr. James Laughlin, Jr., president of complainant company, given in the statement of facts, and dated August 18, 1893, in which he refers to the terms of the pumping contract previously made, furnishes evidence that he had passed upon the terms of the contract before its execution.

The petition to the Common Council, signed by the local officers of the three companies, in which is exactly defined for the purpose of their future contract, the boundary between their respective properties constituted the first act toward the actual execution of

the contract, and it must necessarily have been approved by the general officers of the respective companies, in advance of its presentation to the Common Council. The pumping contract itself recites the fact that the terms of a contract with one Howell, a contractor, for the work of pumping, had already been formulated and practically agreed to.

The pumping agreement further recites the fact that it is made for the mutual benefit of the three companies, parties thereto, *for the purpose of enabling each to mine the ore belonging to it in the bed of Lake Angeline.* This recital alone implies that each of the companies in the negotiation preceding this contract had defined exactly what boundary it claimed and what boundary was conceded by the others: for in no other way could either know what ore each was to mine from the bed of the lake or how the relative expense of each for doing the work ought to be apportioned.

Therefore the petition to the common council signed by the local officers of the three companies, ratified afterwards by the pumping contract, and necessarily made at the instance of the three companies to secure the objects therein proposed, is in itself, though signed by the local officers as it was, a definite boundary agreement. Though it does not constitute the pumping agreement so called, it is sufficient alone to stand as a boundary agreement, because it was made to secure the consent of the city of Ishpeming to pumping the lake: it was by its own terms to form the basis of a mutual agreement between the parties: it was certainly well known to complainant company and was always acquiesced in. Therefore, whether signed by the presidents or only the superintendents of the

respective companies, whether under seal or not, it was sufficient to form a boundary agreement, because the knowledge of its terms and the use of it for the purpose therein expressed by complainant company, acquiesced in for a long period of years, was a ratification complete, and such ratification was sufficient to make it a written agreement.

That paper bears upon its face evidence that it did not contain all the terms, it at least contained terms previously agreed to between the three companies that their respective boundaries were as therein set forth.

But the pumping agreement signed and executed under seal by the three companies, was dated on the 17th day of March, following by only one day the presentation of the petition to the common council and its action thereon by the latter body.

THE PUMPING AGREEMENT

recites the fact that ore had been discovered in the bed of the lake, and it had become necessary to pump the water therefrom and thereafter permanently drain the lake bed, in order that each of the parties might economically mine such ore in such portions of the bed of the lake as each of said parties is respectively entitled to.

That it was necessary to close the Howell contract in order to permit operations to begin while solid ice remained in the lake;

That the Cleveland Company, *after having communicated with both the other parties* (previously) and getting their approval had already entered into the pumping contract with Howell to pump the lake for $33,000.00, and a certain additional sum for purchase of pump appliances;

That the cost of continuous drainage after the water should have been pumped therefrom, was at that time impossible of ascertainment:

That the parties are desirous of fixing the proper proportion of expense both of purchase of pumping apparatus, pumping out of the lake under the Howell contract, and the cost of continuous or permanent drainage of the lake bed, to be borne by each of the parties.

These recitals incontestibly prove not only the necessity for the definition of boundary between the parties, but that the parties had necessarily and finally agreed upon such boundary.

Then follows the agreement between the first, second and third parties, by which the Cleveland Company agreed to pay eight-fifteenths of the original cost of pumping the lake.

And afterwards to assume the burden and advance the entire cost of continuous drainage—the keeping of the lake bed dry, the expense of which was to be divided between the Cleveland Company and the Lake Superior Iron Company. It also agreed to repay, after the lake should be pumped out, to the Lake Angeline Company, the one-fifth part of the then value of the pump, which the Angeline Company would own after the lake was drained.

The Lake Superior Iron Company agreed to pay four-fifteenths of the original cost of pumping and purchase of appliances: also to repay to the Cleveland Company a proportionate part of the cost of continuous drainage in after years, based on the respective tonnage of the Cleveland and Lake Superior Iron Companies on ore thereafter mined by them from the lake bed.

The Lake Angeline Company agreed to bear three-fifteenths of the original cost of pumping and of the purchase of pump appliances. But the three-fifteenths of the cost to the Angeline Company of purchase of pump appliances was to be refunded to it by the Cleveland Company after the lake should once be pumped, and the latter company took the pump and began with its burden of continuous drainage.

Further, the Lake Angeline Company also agreed to divert the water which would enter the lake south of the section line by a flume, into which flume it was to turn all the water pumped from its own mine; and this drainage was to be carried on by the Angeline Company at its own expense, "until the iron ore to which said third party is entitled lying on, in or under the portion of the bed of said lake lying south of the said south line of said section is mined and exhausted, and then to turn over said flume in good repair to the first and second parties without charge and allow them thereafter to operate and maintain the same for the purpose of continuous drainage, giving them free access to the flume for that purpose." (R. p. 90.)

This drainage was thus to be taken care of by the Lake Angeline Company of water "which would otherwise come into the present bed of said lake from all the land lying above the present water level of said lake and south of the south line of section 10 as projected through said lake." (R. p. 90.)

When Howell's contract was completed there remained in the bed of the lake a large quantity of mud which had to be pumped out.

In the letter of Mr. James Laughlin, Jr., President of the complainant company, heretofore referred to, dated August 18, 1893, (Defendant's Exhibit 12), (R.

p. 181), repudiating any obligation of complainant company therefore he said:

> "You cannot but admit that under no circumstances were we interested in pumping the mud out of the bottom of the lake, and had such a contingency been stated in the contract we would not have become a party to it."

This adds to the volume of literature involving the agreement upon the proposition that the Lake Angeline Company had no interest whatever in any portion of the bed of the lake north of the section line, except to be assured that the other two companies should never allow the water to rise in the lake bed high enough to overflow into the shallow bed of the southeast arm and thus enter the mine of complainant in that part of the lake bed.

It would have been difficult indeed for the three parties to have made a contract by which it could have appeared to any disinterested person more certain that a boundary had been agreed to, based upon a good reason for such agreement, to be followed by such consequences that an omission to agree to a boundary would have been too marked for discussion or oversight, than the agreement in question with its accompanying documents.

If quitclaim deeds had been executed between the several companies, they would have left no room for question: they would have been no more solemn in form nor more irresistible in pointing to an agreement than the pumping contract itself, for the latter was founded upon a consideration which compelled agreement as to boundary.

By that contract the defendant Cleveland Company surrendered forever any claim which it might

make to the territory within the triangle south of the section line. That the complainant company so construed it is witnessed by the fact that the complainant company actually mined out that territory, filled the openings with rock, caved other portions, and destroyed it as a mine.

Following the agreement the lake was pumped out. After it was pumped the Cleveland Company and the Lake Superior Iron Company continued permanent drainage from December, 1892, until the date of this suit, at an annual cost of from $5,000 to $8,000, in which complainant company had no part. Of the total cost of $76,000 up to the time of the suit, the Cleveland Company had paid nearly $50,000, and the Lake Angeline Company but $7,000 as their respective proportions of cost to that time. The Cleveland Company, after the lake was pumped dry, continued mining operations to the surface of the lake bed, thus caving it so that it is now impossible to allow the lake to be filled with water without destroying that mine.

In the summer of 1892, the Cleveland Company began explorations in its territory north of the south line adjacent to the mine of complainant south of that line, and bored five drill holes into that territory from complainant's mine under permission from it, and five other drill holes into the territory from the surface above. It drove a long rock drift 600 feet or more through solid rock to reach the territory in which the drills had discovered the existence of ore, but how much was undetermined. From the year 1893 until the fall of 1896, the Cleveland Company continued without interruption the work of exploration in that same territory, to show up all that could be known of the deposits of ore there found by it, in which time it made 3,000 feet

of drifts and tunnels and completed a mine structure as substantial as a house. During the same period of time from the summer of 1892 until September, 1896, trespasses over the south line of ten were settled for by complainant and the Cleveland Company respectively; nails were driven in the wood structure in the mine underneath that line to define it as a boundary, on two different occasions, to.wit: in the year 1895 and again in the winter or spring of 1896. After the lake was pumped dry the original shores have been obliterated in many cases, principally by the complainant, and the lake bed treated as if a lake never had existed there. In the summer of 1896 the complainant company negotiated for and obtained of the Cleveland Company the right to build a railroad track across the very territory in question which the complainant company actually occupied during the winter of 1895 and 1896, under an oral permission so to do, granted by the Cleveland Company.

That the pumping contract therefore was a certain and definite settlement of the boundary between these parties, and that it was followed by such continuous acts of recognition that the Cleveland Company certainly now can never be restored to the position it was in before that contract was made, is too plain for further argument. And that it constituted a boundary settlement of the most satisfactory kind is supported by all the authorities.

Manistee Mfg. Co.vs. Cogswell, 103 Mich., 602;
Jones vs. Pashby, 62 Mich., 614;
Same vs. same, 67 Mich., 459;
Smith vs. Hamilton, 20 Mich., 433;
Joyce vs. Williams, 26 Mich., 332;
Diehl vs. Zanger, 39 Mich., 605.

The position of the complainant in this suit in contending against the force and effect of this boundary settlement, is the most anomalous ever occupied by a suitor in a court of equity. It is still insisting upon the performance of that contract on which it realized and which so far from repudiating it actually introduced in evidence as a part of its main case? Under that contract the complainant company received valuable considerations, which it has not only used to the full but can never restore to the defendants; and these considerations, these benefits which it has thus received, under the sanction and by the terms of that contract, it not only refuses to relinquish, it does not even propose to do so; yet it asks that we be restrained from doing what in that contract is solemnly agreed we might do.

The contention of the solicitors and counsel for complainant upon this head is worthy an analysis, unique and unheard of as it is.

They refer to the flume constructed by complainant for keeping out its own water, coming into the lake bed from its own side of the section line, as some kind of a set-off to the immunity given that company for keeping the lake bed dry after it once was cleared of water. Just how the fact could militate against the definition of the boundary is not pointed out.

The reason for complainant's building and taking care of that flume until the ore the complainant was entitled to lying south of the section line should be mined out, is clear enough to need no explanation. A part of the water taken by that flume carries off the stream which would otherwise flow directly into complainant's mine in the southeast arm before it could reach the bed of the lake. The remaining portion of

the water taken care of by that flume is the water pumped out of complainant's own mine. It is quite unseemly for complainant to arrogate to itself any importance in its own behalf in thus taking care of the water springing from such sources. the testimony shows without contradiction that water coming from the hillsides on complainant's side of the mine not entering from the stream, actually flows into the lake bed through a culvert built in the railroad embankment opposite the mouth of the southeast arm for the express purpose of letting this water into the lake bed, there to be pumped by the defendant companies at their own sole cost and expense.

On the large map exhibit 28 is shown the culvert in question; opposite the mouth of the southeast arm and but a little way beyond that culvert the pump operated by the two defendants in continuous drainage is located in the deepest portion of the lake bed.

Jopling, p. 217.

Defendants' Exhibit 28, R. p. 218.

When complainant's solicitors undertake to contend with the clause of the agreement stating what ore complainant is entitled to, and clearly showing the reasons for the flume as based on the fact that it took care of water which would otherwise come from complainant's own premises into complainant's own mine, and whereby complainant was relieved of any expense for the continuous drainage of water in any other part of the lake bed north of the section line, they repeat over and over again the clauses in question, but do not succeed in their extended argument on this subject in showing that the agreement does not definitely settle the boundary and define it in such way that there can be no mistake.

The solicitors sum up their argument, and all that is said by them on the subject, by the claim for the clauses referring to the ore in which only complainant is interested as being south of the section line "that the clause is expressive of the same mutual mistake as appears all through this testimony in the mutual dealings between the parties." This not only begs the question as to whether the clause is definite as a statement of boundary, and impliedly admits that it is definite, but the contention is absolutely untrue in fact that there was a mutual mistake in this case.

The counsel for complainant makes the somewhat dogmatic statement that the pumping contract was not made to settle or dispose of a disputed boundary; that the question was never mooted, and that there is no evidence that these questions had formed the subject of prior discussion or negotiations, and that therefore the pumping agreement could not operate as a boundary settlement.

In this contention the counsel for plaintiff has overlooked the testimony of Mr. Kidder and Mr. Walters utterly, wherein those witnesses say that on two different occasions they were requested to sign papers recommending the complainant company to exchange with the Cleveland Company quitclaim deeds in order to settle the boundary between them as the south section line.

The solicitors for complainant, in their long brief to the proposition that the pumping agreement is not sufficiently definite and certain to be an estoppel by deed, cite vol. 7, American and English Encyclopaedia of Law, and the cases of Brooks vs. Haines, and Jackson vs. Allen. Neither the text cited nor the two cases support the proposition.

The facts from the record in themselves amply controvert the unsupported assertion of the counsel for complainant to the contrary, that the question of a boundary was never mooted. There is no escape from the proposition that it was in doubt, even though the Cleveland Company claimed it to have been settled by its patent; even though the Cleveland Company claimed to have been in adverse possession for fifteen years; even in spite of the testimony of Mr. Kidder wherein he describes the effect upon his own conduct of the opinion he received from his own attorney regarding the case of Clute vs. Fisher.

That the very foundation of the pumping contract is a definition of the boundary between the several properties is too plain for argument. The denial by the defendant company of any interest in the bed of the lake north of the south section line, can be referred to no other cause than that the south line was the boundary. Would it not be absurd to believe that complainant company did not thereby renounce territory north of the line and lying in the bed of the lake? Is it not absurd to undertake now to construe that contract upon the hypothesis claimed by solicitors for complainant, that all the provisions of the pumping contract requiring expense might be carried out and yet leave the complainant free to claim ownership of the land down in the deep bed of the lake toward the apex of the dotted line, the "equitable center," so-called? To permit such a construction for complainant would be to admit that this contract made the singular provision that the defendants were to keep forever dry and free from water premises of the complainant in the deep portion of the lake, *even after*

complainant had exhausted all the ore it was entitled to south of the section line.

But none of the cases cited in this brief from which a boundary settlement has been found to have been made, exhibits the necessity of an agreement containing the expression, "this agreement has been made to settle a boundary." In all the cases any evidence going to show that a boundary was in doubt and that it had ever been disputed, was held sufficient to warrant an arrangement afterward made by which a boundary was settled on, would constitute by a mere inference a boundary settlement, on the ground that there having been room for doubt, the parties when they finally settled upon the boundary must be presumed to have intended it was a settlement of that boundary.

But the counsel for complainant further contend that even if that contract was a boundary settlement, the complainant is not bound by it, because it was a mistake.

They base this wholly upon the testimony of Mr. Kidder, who said that before the case of Clute vs. Fisher came to his knowledge he had contended that the boundary of complainant's premises was somewhere in the lake, beyond the section line north of it. Some one told him about Clute vs. Fisher, and he thereupon went to his counsel and asked an opinion. The counsel advised him thereon to the effect that there was such a decision. Mr. Kidder thereupon, without appearing to have consulted his superior officers, and without any delay, moved certain buildings erected by that company on made ground north of the section line, removed them to the south. Mr. Kidder also con-

tends that his subsequent actions were all governed by the case of Clute vs. Fisher.

Upon cross-examination by Mr. Hanchette, Mr. Kidder testified that after obtaining Mr. Clark's opinion about Clute vs. Fisher:

> "We then as a matter of protection moved those buildings mentioned to the south of the line in order that we might save them in case Mr. Clark's opinion proved to be correct. I did not make any further inquiry as to our rights, not at that time. I accepted Mr. Clark's opinion as final on the subject, so far as to govern my actions. I understood it to be only a matter of opinion. I understood it to be his opinion, but that the decision was definite by the Supreme Court.
>
> "Q. (By Mr. Hanchette). So long as the matter remained in an opinion it was a matter of doubt, wasn't it? A. Yes. Q. You were also aware of the fact that the courts sometimes change their opinions, were you not? A. I have very frequently thought that with reference to this very thing the Supreme Court might change sometime. Q. And rather than investigate any further or raise any question about it, you concluded to accept the opinion as rendered by Mr. Clark. Is that it? A. Yes, that is so."
>
> R. p. 101.

There is not one word of evidence in the entire case that the defendant Cleveland Company was ever told by Mr. Kidder that he had heard of and relied upon the case of Clute vs. Fisher, that he recognized the section line as a boundary because of that case: there is not one word of evidence that the Cleveland Company ever relied upon that case or ever heard of it. On the contrary it clearly appears that their claim to owner-

ship was based on their patents which gave them the land north of the section line. And it is too much to ask this court to believe that the attorneys for the Cleveland Company recognized Clute vs. Fisher as establishing a rule of property, or as anything more than a mere dictum.

Further, it is quite apparent from Mr. Kidder's own testimony that he lost no time in acting upon Clute vs. Fisher on his own motion: in fact that he acted with the haste of one who is glad to accept the construction he appears to have been led to give it. It is quite apparent also from this testimony that Mr. Kidder knew he was taking chances in so doing, and the case did not remove the doubts from his own mind.

If the complainant company ever did any act based upon Mr. Kidder's opinion of Clute vs. Fisher, the testimony is ample warrant for the conclusion that it was gross negligence to do so: if not, then at least the fault of any mistake he should make was upon him alone.

If it was a mistake, it was not mutual.

Counsel for complainant, arguing upon these premises, contend that the pumping contract, if found to be a contract, should be overturned because based on Mr. Kidder's mistake: that if any agreement can be implied from the facts in the case, that agreement should be overturned because of Mr. Kidder's alleged mistake: if any estoppel *in pais* can arise from the circumstances, such estoppel cannot work against complainant because of Mr. Kidder's alleged mistake.

Throughout the entire argument the counsel for complainant in urging this objection is compelled to insist that the mistake was mutual, contrary to the undisputed facts.

To support his proposition is cited the case of Wilson vs. Hoffman, 70 Mich., 552, in which it was claimed a boundary line agreed upon by a mistake of law on the part of one of the parties was held no estoppel.

In Wilson vs. Hoffman the court distinctly holds that the dictum in Clute vs. Fisher is not the law; and this was as early as June, 1888. Upon the question of estoppel the facts in that case appear to be that Hoffman claimed title upon some such principle as Clute vs. Fisher once seemed to have declared. On his making the claim to the other party, that other party agreed, in behalf of certain minor heirs, upon a division of the disputed territory, upon which the line agreed upon by them was marked with a brush fence, but no other act of improvement nor change in the condition of the parties followed the building of this brush fence. The other party had agreed with Hoffman that he would procure from the minor heirs when they came of age a quit claim deed of the portion of the disputed territory set off to Hoffman, but within a year thereafter announced to Hoffman they were satisfied the law gave Hoffman none of the land, and that they rescinded the agreement. The court held this was no estoppel. In this case it appears there was a mutual mistake of law. It also appears that minor heirs were to be bound by the agreement, and it further appears that no act worthy of the name of improvement or change in condition of the parties followed their agreement. The case therefore has no application.

The counsel also cites Spence, Eq. Jur., 631; Story, Eq. Jur., 123; Renard vs. Clink, 91 Mich., 3; Whelan's Appeal, 70 Pa. St., 410; Hearst vs. Pujol, 44 Cal., 230;

Morgan vs. Dod, 3 Col., 551; Blakeman vs. Blakeman, 39 Conn., 320. There are some other cases cited in the brief of the learned counsel, but these are sufficient for the purpose of argument.

Spence, Eq. The text states the principle generally, that where one parts with his property without consideration, pays money by mistake, signs a deed which was not the deed he agreed to sign, etc., equity will relieve him. The text here does not discuss a case where the other party to the transaction was innocent of any mistake or of any wrongdoing or had acted on the faith of the agreement and could not be restored.

Story's Eq. The text cites a case parallel to Renard vs. Clink—the release of a mortgage by mistake. It is here stated that in the case cited no facts are shown which give adequate reason for the decision rendered in the case that the party having made a mistake could be relieved from his contract; that these facts might have shown imposition by the defendant, undue influence, or suppression by the defendant of important facts which the plaintiff should have known; that if the case cited in the text had proceeded on the naked ground of mistake of law it could not be reconciled with other cases. The text further declares that if the mistake had been mutual to both parties, then it offers a case where both parties have made an agreement which they did not intend to make, and that on such a ground the decision might be upheld. In the same text, in section 125, the law writer declares that a compromise effected between parties both innocent of any wrong, and upon a doubtful question of law, under a mutual mistake, cannot on principle or authority be overturned. The same text, in sections 126 and 127, declares that where a party is wrongly advised about

a well settled principle of law, no mistaken action based thereon will afford him relief from his contract entered into under the influence of such mistake.

The text in Story just referred to cites the opinion of the Chancellor in the case of Lyon vs. Richmond, 2 John's Ch., 60, where the chancellor held:

> "The courts do not undertake to relieve parties from their acts and deeds fairly done, (on a full knowledge of facts), though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law; there is no other principle which is safe and practicable in the common intercourse of mankind. And to suffer a subsequent judicial decision in any one given case on a point of law to open or annul everything that has been done in other cases of like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences."

In the same Story Eq. Jur., cited by the learned counsel for complainant, in section 128 the law writer further declares that in cases of alleged mistake of law the court will not relieve a party urging such mistake unless it finds fraud or undue influence, chargeable to the other party, as leading to or inducing the mistake; that it is not really a mistake of law that furnishes grounds of action for the court, but fraud or undue influence.

In all the foregoing text it is apparent, that where a party is relieved from any kind of action taken by him in contract relations with another party, from the effect of his contract, some other element must enter into the court's action than the mere mistake of one of the parties—that the court will never relieve such a party from the mistakes, unless from the fact

that the other party to the contract has paid no consideration for what he has received, holds what he is not entitled to, and his condition remains unchanged and it would be inequitable, unconscionable, to permit him to hold what he has obtained.

Renard vs. Clink. In this case, under mistake a mortgagee refused acceptance of an amount claimed to have been tendered to him to discharge a mortgage. Under the statutes of Michigan such refusal ordinarily works a forfeiture of the security. The mortgagee insisted upon his mistake in order to prevent the forfeiture, and estoppel upon him was pleaded by the other party. The fact was the mortgage had not been paid. The mortgagor had not been injured by a refusal and to permit the estoppel to be enforced against the mortgagee would have resulted in depriving him of the property in an incumbrance which had never been paid. To prevent an injustice to the mortgagee, and to prevent the mortgagor from thus obtaining property absolutely without consideration, where the mortgagor had not been injured, the court refused to enforce the estoppel. It was a case like some of the others already cited, where the court adopted an exception of the rule in order to prevent an injustice which would have ensued to an innocent party, guilty of no intentional wrong, and whose act had caused no injury or change of condition between him and the other party.

Whelan's Appeal. This case presents the effort of the complaining party, a widow, to reopen a probate settlement of accounts. The reasoning all appears in the finding of the lower court the conclusion of which is approved. The learned counsel refers to this case as holding that where a party has acted in misconception or ignorance of his title and executed an

agreement to his prejudice, he will be relieved in equity. The case cited does not support this proposition. The case was this: The title of the widow Fry to one-quarter part of her father's estate rested upon his will, and upon the question of what charges had been made in his books against the share which would come to her. She was ignorant of her title, because she was ignorant of what the books showed; and she applied to the executors whose accounts she sought to be opened, for information as to what the books showed, to enable her to know what her title was; but she was refused such information. The court held that her ignorance of her title was not the result of negligence on her part but an ignorance forced upon her by the refusal of the executors to furnish the evidence she had called for; and that the facts as presented did not show a case based upon the doubtful construction of a will, (for "will" read "decision"), which equity will never relieve, but is mixed up with other considerations of law and fact which take it from the operation of the rule that equity will not relieve from a mistake of law. The case too presents the fact that the widow's portion of the property had been given to another without consideration. There was no question of change in condition upon the faith of the settlement, or acts done by which the other party could not be restored; and the case has no application. It is rather a strong affirmance of the doctrine contended for by us.

Morgan vs. Dod. This is a case of a surrender by the complaining party of an unsuspected title, based upon a mutual misapprehension by both parties of the law relating to a pledge. Acting under that mutual misapprehension of the law one party obtained possession of property to which he was not entitled. And

here, too, there was no question of consideration paid or change in the condition of the parties. And in giving its decision the court recited the fact as warranting its decision, that to deny relief to the complaining party would give to the other party an unconscionable advantage, and where the circumstances made it quite practicable to place both parties *in statu quo*.

Hearst vs. Pujol. This case is almost identical in character with that of Morgan vs. Dod.

Blakeman vs. Blakeman. In this case a right of way through a lane was extinguished by the purchase of the servient estate by the owner of the dominant estate. The owner afterwards sold the dominant estate and conveyed by warranty deed, with privilege and appurtenances. In making the sale the seller represented to the purchaser that the right of the lane was preserved and existed and was conveyed to the purchaser by the deed. The grantee paid his consideration to cover the right of way, and supposed the deed covered it, as did also the seller, and the purchaser would not have paid his consideration for the land alone. Both purchaser and seller were ignorant of the legal principle that the right of way had been extinguished, and both believed it still existed and was conveyed as mentioned. The mistake was regarded as one of fact by the court, and not the mistake of the legal effect of a deed. Equity relieved the grantee, who had thus paid his consideration for what he did not obtain. The case offers a clear and distinctive illustration of all the cases upon the principle on which the learned counsel for complainant seeks relief in this case. The facts are as widely different from the facts in this case as the sun from the earth, and the mere recital of the

facts in the case thus cited by the counsel, constitutes an argument against him.

And it is upon such authority as the foregoing that this complainant asks to be relieved from the force and effect of the pumping contracts and all the facts that followed on the faith thereof.

Upon such a slender excuse do they seek to avoid the contract which they continue to affirm: to take from the defendant Cleveland Company what they gave it under a contract which they do not even ask to be cancelled, but which they conclusively affirm: upon which they hold the consideration and benefits received by them under the contract, while denying to the defendant the same right.

And they make no offer of restoration.

But suppose the bill of complaint had been brought to annul the pumping contract and restore the parties upon the claim of a mutual mistake, or by any other reason. Such a bill would not be warranted by the authorities cited by complainant.

At the outset they would fail to show a mutual mistake.

The next failure would be in showing that the mistake claimed was a mistake upon which complainant had a right to rely, for it was a mistake of a kind which the very authorities cited by the learned counsel for complainant repeatedly declare can never form a basis for relief.

The mistake was in no way induced by the conduct of defendant. The defendant is absolutely innocent of any fraud or representation or misleading influence.

A further and insurmountable obstacle is the pumping contract: neither the complainant nor the

court could restore conditions existing before the contract.

(a) It could not restore to defendant the Cleveland Company ore and the territory comprised within the triangle, for the ore has been taken therefrom and the mine wrecked.

(b) It could not restore the waters to this lake where they were before the contract, without destroying three great mines, which subsequent to that contract have been opened in the lake bed and exposed to the inflow of water therefrom. One of these mines is in undisputed territory.

(c) It could not compel the three parties to join in a drainage contract on any different lines with any different boundary than that set forth therein: and it could not ask this court to make another contract to which none of the parties ever agreed: the court in a proper case may annul a contract and also in a proper case where its terms do not express the real contract, reform it so as to carry out the real agreement made, but there is no law otherwise warranting a court in interfering with a contract and changing its terms. There is no basis for reformation. The contract must stand as drawn or fall all together. Indeed if once this contract was annulled, each could insist on his original rights as riparian owner—that the lake should remain.

(d) The complainant could not take from defendant the territory north of the section line in which a great mine had been opened, and restore to defendant that which it has expended to-wit: the hazards of that undertaking. It is of no consequence, even if true, that defendant may have made a profit up to date on all the money expended. It is entitled to more: it is entitled to all the ore in that mine, for such is the

full value of the hazard undertaken by it on the faith of the agreement in question by the active consent and co-operation of the complainant.

If there were nothing else in the way, the simple, single fact that the court could not relieve the complainant of the consequences of this contract, and at the same time do full justice to the other party who has been innocent of wrong, and restore it to the position it would have been in if the contract had not been made, would bar the court from giving relief.

Ignorance of the law or a mistake as to a party's rights, will not protect one from a bar by estoppel, when but for such plea of ignorance the law would enforce the estoppel for acts and conduct, wheu to refuse to do so would be inequitable.

Tilton vs. Nelson, 27 Barb., 595;

Storrs vs. Barker, 6 Johns. Ch., 166;

Town vs. Needham, 3 Paige. Ch., 545 and 555.

Taking into consideration the conditions complainant was in before that contract was made, the circumstances which doubtless led to it, the discovery by complainant of a valuable mine south of the line, in which it would likely desire to have the entire benefit, with the certainty of having a valuable mine south of the line, and without knowledge that the territory north of that line had any value, it is clear that Mr. Kidder, on whose sole ideas the entire case of complainant is based, may well have thought his company would gain rather than lose by accepting Clute vs. Fisher as law. If therefore his acts and conduct had never been reduced to writing in a formal agreement, an estoppel would have as inevitably arisen as from the contract itself.

It is now open to complainant to claim in this court that Clute vs. Fisher did not establish the law, it was the privilege of complainant to do the same thing following its knowledge of that decision in 1888, precisely as was done in the case of Ice Co. vs. Ice Co., subsequently heard, in which the lower court held that Clute vs. Fisher was merely a dictum and not the law of Michigan.

When therefore complainant chose to act upon that decision at a time when it was vital to make the boundary line certain beyond cavil or dispute in the future, and proceeded to make the pumping contract and thereafter to actively encourage the Cleveland Company to treat the section line as a boundary, to expend its money in the hazardous enterprise of discovering a mine in that territory, upon the faith of that boundary, the complainant, by such action as solemnly adjudicated the rights of the respective parties as if it had brought a case at law and obtained the judgment of a lower court thereon for that purpose, sustaining if you please Clute vs. Fisher with which complainant was satisfied, and prosecuted no appeal.

The defendants never knew that Mr. Kidder supposed Clute vs. Fisher to be law, or that that case had any influence in leading complainant to join in the pumping contract and fix the respective boundaries and obligations, benefits and privileges of the respective parties with reference thereto.

There was nothing to show to either of the defendants that the complainant entered into the stipulations of the pumping contract and the previous negotiations and applications upon which it is based, for any other reason than to define the boundary, that each might thereafter be governed thereby.

It was not the case of Clute vs. Fisher, but the discovery of ore south of the line by complainant, and the belief of Mr. Kidder that ore did not exist north of that line, which led complainant to make that contract.

If Mr. Kidder really chose to believe, as he testified, that Clute vs. Fisher was probably the law, it was no greater error on his part and no more excusable in this case than would have been the mistake of a surveyor sent out by the respective parties to locate a boundary between them. In such case as the latter, acquiescence in the act of such a surveyor, though based wholly upon a mistake, would conclude all the parties forever, even though the mistake of the surveyor should afterwards be clearly shown.

All the questions flowing out of Clute vs. Fisher, so persistently invoked for complainant—whether it was or was not to be relied on as established in law; whether if it did it would be overturned at some future time; whether the boundary was a section line or an irregular, unascertained line in a practically undeterminable place in the lake to find which no court ever established a satisfactory rule; whether the boundary had already been fixed by patent or was open to settlement between the parties; and finally, whether it was desirable, on complainant's part, to fix upon any other line than the section line as a boundary; in other words, whether it did not then appear to complainant to be very desirable to fix the section line as a boundary for all purposes, whereby it would gain more than it would lose—all these questions were before the complainant when negotiations leading to the pumping contract were under way.

It is to cut off repudiation of a solemn agreement made under such circumstances, followed by such important, complete and unalterable changes in the position of the parties upon the strength of such an agreement, that the law of settlement of boundary, the law of estoppel by deed, the law of estoppel in pais, and every other kind of estoppel which may be urged, has arisen.

Finally, upon the question of permitting a mistake to interfere with an estoppel in pais, the very text from which the general principle was taken relied upon by the complainant, denies an application of the rule to plaintiff's case, in the following:

> "The rule has sometimes been stated as though it were universal that an actual knowledge of the truth is always indispensable (to effect an estoppel). It is however, subject to so many restrictions and limitations as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge would be charged to him. In such case ignorance or mistake will not prevent an estoppel. Nor does the rule apply to a party who has not simply acquiesced, but who has actively interfered by acts and words, and whose affirmative conduct has thus misled another. Finally, the rule does not apply even in cases of mere acquiescence, where the ignorance of the real fact was occasioned by culpable negligence."
>
> Pomeroy's Eq., Vol. 2, Sec. 809.
>
> Sullivan vs. Colby, 71 Fed. Rep., 460, 465.

IV.

THE RECITALS OF THE PUMPING CONTRACT CONSTITUTE AN ESTOPPEL BY DEED.

A party is estopped from disputing his deed, even though he may not have understood its terms, and though a boundary described may have been wrong.

White vs. Smith, 37 Mich., 291.
Payne vs. Atterbury, Har. Ch., 414.
Thompson vs. Smith, 96 Mich., at p. 268.
Fahey vs. Marsh, 40 Mich., at p. 236, 240.

And this doctrine applies to particular and definite recitals in any instrument executed in the same manner as a deed, when such recitals are material facts in such instrument.

Bigelow on Estoppel, 4th Ed., 354.
Smith vs. Graham, 34 Mich., 302.
Kennedy vs. Brown, 61 Ala., 296:
Johnson vs. Thompson, 129 Mass., 398:
Bell vs. Todd, 51 Mich., 21:
Nivett vs. Berry, 5 Cranch, (Cir. Ct.), 291:
Dundas vs. Hitchcock, 12 How., 256.

The presentation of this proposition again brings to mind that the complainant occupies the unique position of attacking this contract while affirming it and relying upon it, that its bill is not framed for the purpose of attacking this contract, that it holds the consideration it has received under the contract: and finally, that in the very arguments of its counsel the stipulations relating to boundary are sought to be voided: not because they do not indicate what they mean and are therefore not sufficiently definite and certain, but because they were entered into by a "mutual mistake," which mutual mistake did not exist.

V.

UPON THE PRINCIPLE OF AN IMPLIED AGREEMENT THE COMPLAINANT IS BARRED FROM DISPUTING THIS BOUNDARY.

If a boundary between the adjoining owners was not fixed by the descriptions in the patent in so certain a manner as to leave no room for doubt, and if any kind of a doubt or dispute ever arose regarding that boundary, and afterwards the parties by the active conduct and acquiescence upon the part of one of them in assenting to a line claimed by the other in such a manner as to imply full assent thereto, followed by a change in the condition of the parties of such a character that neither can be allowed to disturb the arrangements without injustice to the other, the Court will estop both of them from disputing the boundary, upon the principle of a boundary settlement inferred by the court.

The fact that the boundary so acted upon is not the true one, the fact that it may have been fixed by a surveyor by reason of a mistake of that surveyor, it afterward appearing that the surveyor did make such a mistake, in no way interferes with the application of the principle.

Dibble vs. Rogers, 13 Wendell, 536.

If the agreement in writing did not exist under the acts of the parties following the time when that contract was executed, the signing of the petition to the common council by the superintendents, stating a boundary, an act fully ratified by complainant's conduct thereafter; the work of pumping the lake apportioning the expense thereof in the manner actually

followed, whereby the burden of continuous drainage was imposed solely upon the two defendants: the denial by complainant of any concern in the draining of the main portion of the lake bed or of any part of the lake bed north of the section line: the assumption by the complainant of a right following the time of the execution of the contract, to treat as its own property the territory comprised in the triangle: all these, and even any one of them, would be sufficient to impel an equity court, under the cases heretofore cited, to infer an agreement as binding and effective as the most solemnly executed covenant.

Upon this the learned judge of the court below, in deciding this case, well stated the position as follows:

> "If it is conceded, as urged by complainant's counsel, that the primary object of the parties in making the pumping contract was not to settle or dispose of any disputed question of riparian rights or boundary, still the question remains, was it not the intention of the parties to that instrument to so apportion the cost and expense of that work as to make the south line of section ten the boundary line? Was not this fact, that the south line of section ten was the boundary, made the basis of the contract in the apportionment of the expense and cost of that work? If so, was not this such an implied agreement and recognition of the line as fixed and established it within the language and the meaning of the Supreme Court in Manistee Mfg. Co. vs. Cogswell?
>
> "Is this not a fair test to apply: Would the defendants have entered into and made the contract on the terms therein contained, had the complainant claimed to them that it owned the territory now claimed lying north of the

> south line of section 10, and that it proposed to extend its line to the so-called equitable center of the lake? Most certainly not. There is ample reason to say that defendant would never have made this agreement had the complainant informed them that it claimed to own a large part of the most valuable portion of the land in the bed of the lake north of the south line of section 10."

But under the authority cited, wherein an agreement to settle a boundary has been inferred between the parties by their conduct, there are many other acts of these parties than those above mentioned, from which this court would have ample warrant to infer a settlement of the boundary.

The drilling operations conducted by defendant from the south line to reach the territory north of the line, and the consent of complainant and its active co-operation therein, would give rise to such an implied agreement.

The vast improvement made by the Cleveland Company north of that line in creating a mine structure in the bowels of the earth, at least one-half of which was in solid rock, with chambers more than half a mile in length—all this with the consent and active encouragement of complainant and the knowledge that it was based upon the belief by the Cleveland Company in the full consent of complainant to the section line as a boundary, would constitute such an implied agreement.

So would the leasing to complainant of ground for a railroad track over the disputed territory.

So would the mutual settlements for trespasses across that section line, with the accompanying maps marking the line as a boundary.

So also to the same end would be those acts of complainant and defendant the Cleveland Company in driving nails in the timber structure under that section line, on two different occasions, once in 1895 and again in 1896, to mark it as a boundary.

In Deihl vs. Zanger, 39 Mich. 605, the parties had not themselves fixed a boundary line, but had acquiesced in the existence of a fence as apparently marking the boundary and which they had treated as such; upon such facts Cooley, J., at p. 600, citing the doctrine of Smith vs. Hamilton in support of the statement, held the party estopped to question the boundary upon the ground that

> "Long practical acquiescence of the parties concerned in supposed boundary lines should be regarded as such an agreement, upon them as should be conclusive, even if originally located erroneously."

In Jones vs. Pashby, 62 Mich., where the true division line was in dispute, but where no question of estoppel appears to have been considered by the trial court, the court said at page 625:

> "There was evidence introduced upon both sides tending to show an actual location of the boundary line * * this testimony should have been submitted to the jury (on the question whether the line had been so fixed to estop inquiry) * * If no agreement of practical construction had been put upon the deed in applying it to the subject matter by the owners then the division line which would divide the whole tract in two equal parts in quantity should govern."

In the same case, afterward tried and again reaching the Supreme Court, reported in 67 Mich., 459, the

court held that an occupancy with reference to and recognition for eight years of boundary was such, in character (though it seemed to rest upon acts implying only, an agreement) that an agreement to fix the boundary appeared almost conclusive. The court further held that the deed having left the meaning of the grantor so ambiguous that the true line had to be settled in court, therefore

> "Both parties might well be in doubt as to where the line was located by such deed and therefore in order to settle such doubts they were authorized to meet and agree where a boundary line should be."

In Dupont vs. Starring, 42 Mich., 492, the action was trespass and the facts showed that while one party claimed a certain line as the boundary and made improvements accordingly, the other party appeared to have assented thereto; upon this fact Cooley, J. said:

> "It has been repeatedly held by this court that a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new survey."
> Smith vs. Hamilton and other cases.

The question then occurred to the court whether the evidence was sufficient to support the contention that the plaintiff was estopped by conduct amounting to an agreement to fix a boundary line, and commenting on such evidence on which the jury found in favor of the defendant that such an agreement was made or acquiesced in, said: (p. 494.)

> "We have had some doubt whether the special findings in this case were sufficient to show that there had been a claim on the part of the defendant of the old fence as the true

> boundary line and an acquiescence in this claim by the plaintiff's grantors for the period named, * * * but as the establishment of a line by claim and acquiescence appears from the record to have been a subject of dispute on the trial we do not doubt that the jury supposed their special findings covered the case."

The foregoing language is important only because the principle of the case involved was that now under discussion and not the principle of a bar by adverse possession for the statutory period.

In Manistee Manufacturing Company vs. Cogswell. 103 Mich., 602, there was a claim that a boundary had been established by agreement and acquiesced in by the parties by the making of improvements with reference thereto. The case was ejectment and the court took the case from the jury and directed a verdict for defendant on the ground that it conclusively appeared such an agreement had been made and acquiesced in. The evidence quoted at some length does not show an agreement at all, but acts and conversations from which the Supreme Court seemed to think such an agreement might well be inferred, and while holding it was not *conclusive*, held that it should have been submitted to a jury. In so doing the court said: (p. 605.)

> "The question presented is, whether the testimony conclusively shows that the parties intended that the line as *established* by defendants should be treated as the true line * * * if the jury had found as a matter of fact that the plaintiff intended to assent to the line fixed by defendant's building, there may be enough in the testimony to support such a finding; but this is far from saying that the fact conclusively appears. We have no doubt that defendants have a right to make this defense in a suit at

law. Hayes vs. Livingston, 34 Mich., 384; but mere non-interference with the defendant's occupancy is not enough to constitute a defense until such occupancy has ripened into a title by adverse possession unless there has been some agreement expressed or implied fixing the line in which case acquiescence for a less period than 15 years is sufficient * * * and which has been followed by a change in the condition of the parties made on the strength of such acquiescence is sufficient.

Smith vs. Hamilton, 20 Mich., 433.
Joyce vs. Williams, 26 Id., 332.
Cronin vs. Gore, 38 Id., 381.
Bird vs. Starke, 66 Id., 654.
Jones vs. Pashby, 67 Id., 459.

In support of the rule as stated in the quotation from Manistee Manufacturing Co. vs. Cogswell that where no express agreement is shown, acquiescence by one party in a line assumed by the other to such extent as to imply assent thereto, is sufficient to imply an agreement and will constitute the bar, our court cites:

Kellogg vs. Smith, 7 Cush., 376.
(Approved in Smith vs. Hamilton.)
Rockwell vs. Adams, 6 Wend., 467.
Dibble vs. Rogers, 13 Wend., 536.

In Dibble vs. Rogers, 13 Wend., 536, there was evidence of a long acquiescence in the location of a boundary line which appeared on the trial to have been erroneously located. No agreement fixing the line as the boundary line appeared in evidence, but there were acts and declarations of the parties showing an acquiescence therein. The trial court, as was held properly, instructed the jury that, (p. 539.)

"A long acquiescence in an erroneous location by the plaintiff authorized the jury to find

> that the plaintiff had agreed to a location different from that given by his deed; and whether he knew his rights or not such location or acquiescence would conclude him; and that if the jury were satisfied that the plaintiff had agreed to such location, of which his long acquiescence in the location contended for by the defendants was evidence, that they would find for the defendants."

The court further held that acts and declarations of the parties are competent evidence upon the question of location; that their admission does not conflict with the principle that a man shall not be divested of his title to land by parol.

VI.

IN THIS EQUITY COURT, COMPLAINANT IS ESTOPPED BY MATTER IN PAIS.

At law, estoppel in pais cannot bar a legal right or be used to affect permanent interests in land, but in equity it is as effectual in the case of a boundary, as that meeting and agreeing on an uncertain boundary which forms the subject of subdivision V.

Estoppel *in pais* is the enforcement of that principle that one shall not be heard to deny that, as a fact, which his conduct has led another to believe existed when the latter has acted in accordance with that belief.

The principle has been asserted in actions of ejectment and trespass in this state where it has been confounded with cases of "settlement of boundaries."

It has been repeatedly held to be a defense *in equity* to actions for the recovery of land.

Smith vs. Hamilton, Supra, last paragraph.
Hayes vs. Livingston, 34 Mich., 384.
Baldwin vs. Brown, 16 N. Y., at p. 364.
Terry vs. Chandler, 16 N. Y., 354, where the distinctions are pointed out.
St. Louis N. S. Co. vs. Wiggins F. Co., 102 Ill., 514.
S. C., 112 Ill., 384.
Winslow vs. Cooper, 104 Ill., 236.
Blake vs. Fask, 44 Ill,, 302.
Adams vs. Rockwell, 16 Wend., 285.
Morgan vs. Railway, 96 U. S., 716.
Tilton vs. Nelson, 27 Barb., 595.
Storrs vs. Barker, 6 Johns. Ch., 166.
Town vs. Needham, 3 Paige Ch., 555.
Dickerson vs. Colgrove, 100 U. S., pp. 578 and tp. p. 580.
Clegg vs. Edmondson, 8 Deg. M. and G., 787-808.
Twin Lick Oil Co. vs. Marbury, 91 U. S., 592, 593.

These last cases hold that profit made by the defendant after hazardous expenditures, do not help plaintiff.

In Smith vs. Hamilton, Judge Campbell merely alluded in the closing paragraph of the opinion to the enforcement in equity of an estoppel differing from the kind involved in that case.

In Hayes vs. Livingston, Chief Justice Cooley, while denying the right of a defendant to recover in ejectment a judgment on the strength of an estoppel in pais, not only approved a long line of autohrities

holding such a defense perfect to affect a permanent interest or title in land, but said further: (p. 394.)

> "Estoppels relating to real estate so far as we can find have been uniformly enforced in courts of equity and usually by injunction: and this is manifestly in accordance with the analogies of the laws.

Again: (p. 390.)

> "Equity may always compel the owner of the title to release it where that is the proper redress for a fraud committed by him in respect to the title: but the remedy is properly administered by compelling the fraudulent owner to convey instead of treating the case as one of estoppel in the strict sense.

Again: (p. 395.)

> "Whatever may be the reasons, and whether satisfactory to ourselves or not, we are not at liberty to disregard the fact that the legislation of the state still leaves equitable claims to be tried in the courts of equity. And when one asserts that the owner of land ought to surrender it to him because of the owner's fraudulent acts and conduct, it is manifest that this claim is only an equitable claim set up and asserted against the legal claim. The one has the legal title, and the other seeks to overthrow it by proving a superior equity. This he may be able to do in a court of equity, but we cannot admit that at law the legal title is not entitled to prevail."

In Morgan vs. Railway Company, the company was engaged in locating a railroad in Illinois. Morgan was in its service as an engineer in locating the lines, stations, etc. With a view to locating a station and laying out a town, Morgan and others bought four

parcels of land, made a map of the town site and represented thereon as "railway company's land" a certain depot site, but to which as a matter of fact no title was conveyed to the company. While the title remained in Morgan the company proceeded to build the station on the land to which Morgan made no objection. Afterwards Morgan filed a bill to settle the title to the property to which the railway company interposed a defense that Morgan was estopped from claiming the title by his acquiescence when he ought to have spoken.

The court held that the facts established a defense in equity: that the depot would not have been built upon the premises if any doubt had been entertained as to the ownership by the company: that it would have been a fraud on the part of Morgan to stand by in silence and see it erected under such circumstances, if he could then defeat title. That it was not necessary in barring Morgan's claim to decide whether estoppel in pais passed the legal title by inurement. The court recognized the fact that the courts of this country are not in harmony on the proposition that estoppel in pais can actually convey title the same as in a case of estoppel by deed.

In Norfolk & W. Ry. Co. vs. Perdue, 40 W. Va., 442, it was held that one claiming to be the owner of a tract of land who had notice that a railway company was proceeding to excavate a tunnel through a mountain located on said land, under claim of title thereto, and remained silent as to his ownership and assisted in constructing the tunnel until its completion, and then brought an action for damages, was estopped from recovering in said action and enjoined from further prosecuting such action. The court held the

principle that when one or two innocent persons, each guiltless of any intentional or moral wrong, must suffer a loss, it must be borne by that one of them, who by his conduct, acts, or omission to act, has rendered the injury possible. See also

Herman on Estoppel, 776:

Pickard vs. Sears, 6 Adol. & E., 469.

In the case already referred to of Twin Lick Oil Co. vs. Marbury, 91 U. S., 592-3, the court estopped the complainant party from litigating a title to land valuable only for mining purposes, who had stood by and witnessed its development by defendant, claiming title. The facts in that case and the well reasoned opinion thereon, are particularly applicable here.

In Clegg vs. Edmondson the complainant had been a partner of the defendant in the leasing of mining property as a business. It had been agreed between them that if either should obtain a lease of mining property, the other should be admitted to a partnership interest therein. The defendant procured such a lease of a mine property, which had been partly developed, and thereunder proceeded to complete the development thereof, and at much hazard and after considerable expenditure, developed a mine property of great value, during which time, for a period of about nine years, the complainant, while protesting he was entitled to share therein, brought no suit. The court, (per Lord Justice Turner), in delivering its opinion cutting off the complainant by an estoppel said: (807-808).

> "We have to consider then, the question of delay and acquiescence and in determining the effect due to these considerations, we must take into account both the nature of the right which

is claimed and of the property in which it is claimed. * * *

"It was said, indeed, on the part of the plaintiff that these mines had been tried and that there was no uncertainty attaching to the value of them, but I do not find from the evidence that they had been explored to any such extent as could render their value certain and, on the contrary, the evidence shows that faults were met with in the working under the new lease and the expense of the workings would, of course, depend upon the nature and extent of these faults. What expenditure they would occasion or to what extent they would affect the value of the mines could not of course be foreseen. If they had led to ruinous expenditure and had rendered the mines unproductive, nothing would of course have been heard of this claim of plaintiff's, and there would have been no claim against them. Are they then, in justice, entitled to reap the benefit when they could not have been made subject to the loss? It is said for the plaintiff that the expenditure has been more than met by the profits, but this does not seem to me to vary the case, for the profits justly belonged wholly to the lessees unless the plaintiff was entitled to share in them and to assume that the lessees were not expending their own money would be to assume that the plaintiffs were so entitled which is the very question we have to decide."

See also Pendergast vs. Turton, 1 You. & Coll. Ch. 97.

It is contended by counsel for complainant that there can be no estoppel in pais in such a case, unless the element of fraud exists; citing Henshaw vs. Bissell, 18 Wall. 255, Brant vs. Virginia Coal & Iron Co., 93 U. S., 326.

Henshaw vs. Bissell presents the case of conflicting claims under floating Mexican land grants. Under the floating grant the plaintiff selected a claim in a certain locality, and was satisfied to hold by the boundaries of that selection. But the government, through its appropriate officers, interfered and asserted that another and different location was required by the grant. Because of the plaintiff's conduct, based on this action of the government in holding to one of these parcels rather than the other, and claiming his boundary line for a long time to have been that which the government compelled him to take, the other party asserted an estoppel against him. On such facts the court held that equitable estoppel, such as would prevent him from obtaining his legal rights in the land, could not be asserted, because "there must generally be some degree of turpitude in his conduct which has misled others to their injury." The facts passed on by the court in that case do not warrant any other statement of legal principle applicable thereto.

In Brant vs. Va. Coal & Iron Co. the plaintiff brought an action, claiming title to certain land occupied by the Virginia Coal & Iron Company which the latter occupied and claimed under a foreclosure sale wrongfully made. The mortgage had been executed to a widow claiming under a will, upon the sale by her of the property and in consideration of the purchase price. But the widow had no such right as she claimed under the will, the property under the law belonging to other heirs whose interest the plaintiff had purchased. The plaintiff was in no way a party to the mortgage or its foreclosure, and he had done no act and made no declaration at any time claimed by the defendant to

have affected in any way its title or claim of title. The defendant, nevertheless, pleaded estoppel against the plaintiff. But the court held that the foreclosure proceedings did not estop the plaintiff: that to estop in any view of the case, the defense must show that his language or conduct was the direct motive or inducement to the purchase. This was sufficient to decide the case, but the court proceeded further to say that no estoppel will arise in the absence of actual fraud, unless the purchaser was not only ignorant of the true state of the title, but had no means of acquiring knowledge by a recourse to the record. But the court, recognizing the principle pertinent to the case at bar, said "it is a principle of universal application that a person assenting to an act and deriving and enjoying title under it," (for title read benefits, immunity from cost, and the triangle) "shall not be permitted to impeach it."

See case cited by counsel for complainant, pp. 330, 331.

In Freeman vs. Cooke, 2 Ex., 654, Parke, B., referring to the word "willfully," as used in Pickard vs. Seares, says:

> "If, whatever a man's intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth. In short, the representations are to be regarded as 'willful' when the person making them meant them to be acted upon, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act upon it."

Herman on Estoppel, after quoting the above in Sec. 754, says:

> "The word 'willful,' as used in this connection, is not to be taken in the limited sense of the term 'maliciously' or of the term 'fraudulently,' nor does it of necessity imply any active desire to produce a particular impression or to induce a particular line of conduct. Whatever may be the motive one who so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his conduct, is legally chargeable with an intent or willful design to induce the other to believe him, and to act upon that belief, if such prove to be the actual result."

The same author, in Sec. 772, says:

> "It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief in the existence of a state of facts, which it would be unconscionable to deny, but it is not essential that he should have been guilty of positive fraud in his previous conduct. Nor is it essential that there should in all cases be an intention to deceive, or even a knowledge that the representation was false."

In Pickard vs. Sears, Lord Denman, in declaring the rule of law governing estoppels in pais concerning conduct which counsel for complainant asserts must show actual fraud in the party to be estopped, says:

> "The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act upon that belief

> so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time."

Commenting on that opinion, Miller, J., in Boardman vs. Ry. Co., 84 N. Y., 182, adds:

> "Nor is it essential to an equitable estoppel that the party should design to mislead. And it is sufficient if his acts were calculated to mislead and have misled another acting upon it in good faith and exercising reasonable care."

So that intentional fraud is wholly unnecessary in a party against whom estoppel is enforced. It is sufficient if the circumstances are such that it amount to a fraud to allow him to assert a right. His original acts and conduct upon which estoppel is applied, may have been innocent of any wrong intent. It is sufficient that legal fraud should result in case he is permitted in his suit to overturn his original action and deprive another of advantages and benefits and improvements made on the faith of the former action. And this is the doctrine of the courts of this state.

Thus Cooley, J., in Ferguson vs. Milliken, 42 Mich., 443, says: "Estoppels rest upon the protection of equities."

But it is further asserted in behalf of complainant as against the application of the principle of estoppel in pais to bar this action, that defendant, the Cleveland Iron Mining Company, has not been injured, but on the other hand has made a profit by its transactions in the disputed territory.

The attempt in the brief for complainant to show this profit is labored, like the testimony of complainant's employes upon which the argument is based. On

complainant's side on the hearing, the testimony regarding this profit was all based upon estimates on assumed states of fact, and upon comparisons with certain kinds of cost of mining ore in the mine of complainant.

On defendant's side it was shown that these estimates were wild; that the actual cost for driving the long drift through the rock, mentioned in the evidence, was nearly, if not quite, double what the witnesses for complainant had estimated such a drift would cost.

Whereas, also, complainant's witnesses assumed all the openings made by defendant in the territory on the south line were in ore, the actual fact was developed, without contradiction, that one-half of all these drifts and levels were in solid rock. It appeared that the ore taken out of a drift driven wholly in ore, would pay the cost of the drift; that this would not pay for the drifts run through solid rock, which were of course wholly outgo.

But what if plaintiff did make a profit on ore mined from the disputed territory, over and above the cost of that particular work? Profit has nothing to do with the case.

The equity involved in the proposition here discussed may be simply stated thus: When the defendant, acting upon the faith of the pumping contract, or upon the faith of an agreement preceding that contract, or upon the faith of an agreement implied from that contract with all the others in testimony, proceeded at great hazard to explore the territory in question, and after the discovery of ore proceeded at further great hazard and expense to develop the find, in order to determine whether it had value or not, it became entitled as against the plaintiff to every pound of ore

and everything of value existing in that territory, discovered at its own hazard and expense. Such only can be the full compensation to one who is entitled to any consideration whatever for his hazard. Though that mine may exist a thousand years, the defendant is entitled to the whole of it.

It was the money of defendant only, that was expended in its development. If nothing had resulted, the defendant would have suffered a loss of many thousand dollars. The complainant would not have shared in that loss: and complainant is not entitled now to reap the benefits or any benefit whatever. The opinion of Lord Justice Turner in Clegg vs. Edmonson is a complete answer to the argument of complainant based on the alleged profit realized by the defendant.

But complainant contends in this same line that defendant is not entitled to the full equity claimed by it for the hazards of its discovery and development of a mine in the disputed territory. The complainant contends that its own officers informed Agent Mills of the defendant company of the probable existence of ore north of the line in the summer of 1892, and complainant insists upon this fact it is entitled to some credit and equitable consideration as against the claim of defendant. But why? The claim of the complainant is absurd. It is true its officers called the attention of Mr. Mills to the fact that the deposit of complainant in the southeast arm would probably extend north of the line into defendant's territory. This was in the summer of 1892, after the pumping contract had been executed and the lake was already in process of drainage thereunder. That contract had been made to protect the complainant in taking the ore from the triangle and everything south of the line, and to protect the

defendants in the discovery and development of everything north of the line.

Further, that ore existed in the territory north of the line was but the first symptom of value, and not proof of it at all. Complainant's own experience with its mine in the southeast arm, is conclusive evidence that the mere existence of iron ore is not a proof of its value. For after the defendants discovered the ore in 1889, it sunk a shaft occupying many months in construction; and even after that shaft was bottomed in iron ore, complainant conducted development work for nearly a year thereafter, for the sole purpose of assuring itself of the extent of value there discovered.

Though defendant was told by complainant that ore existed north of the line in the summer of 1892, it at great expense put down ten diamond drill borings to discover such ore. Evidently such work was not mere idle child's play, but a serious effort to discover.

It was after all these borings that the defendant commenced and continued for a year the work of constructing the long rock drift from the north to the south side, to reach the supposed deposit. This was also purely investigation.

And it is significant that as late as the time when this rock drift was in process of construction by defendant, the complainant's mining superintendent believed it promised too small a result to warrant the undertaking. He represented to defendant's agent that he believed the entire result of all explorations there would discover so small a quantity of ore that defendant would not be repaid for the trouble of that drift, and advised Mills to let the complainant company have the comparatively small quantity of ore, which might possibly be found there, as it could be

cheaply mined from the south side of the line through complainant's shaft.

Walters, p. 133.

It is clear therefore from complainant's own testimony that after investigation commenced by defendant, the enterprise seemed hazardous for at least two years, though investigation at great expense continued without interruption.

It was not in fact until the summer of 1896 that the deposit in question assumed large proportions. On July 2, 1896, Mr. Bradt, complainant's engineer, accompanied the engineer of defendant Cleveland Company on a visit to defendant's work, and upon observing the great development at that time, expressed surprise at the extent of it.

Jopling, p. 207.

It was this awakening on July 2, 1896, to the real value of the development by defendant in that territory, and not Clute vs. Fisher, or any other cause urged by complainant, which led to this suit.

But it is idle for complainant to cite authorities to prevent an estoppel in pais against complainant under the circumstances of this case. A more inequitable attempt could not be conceived of than the undertaking in this suit.

No authority cited among the numerous cases in the briefs for complainant, supports the proposition that the Angeline Company can hold to the pumping contract, have the triangle and retain the benefits and prosecute this suit: that it can ask successfully for equitable relief in an attempt to procure property made valuable solely by the hazard, the enterprise, and the expenditures of the defendant: that it can trample upon the contract which it has solemnly

affirmed in this very case: and that after having wrecked and destroyed the property in the triangle, a right to which it undeniably obtained by virtue of the agreement between these parties, it can ask to receive from defendant all that defendant likewise obtained under the same agreement.

There is not the slightest evidence developed by the facts in this case of equitable conduct at any period of the history thereof in its treatment of the defendant. It delayed for a period of eight months after Mr. Kidder had been fully advised of the case of Ice Co. vs. Ice Co. and its effect upon its interests, to even notify the defendant companies of his change of front.

The truth is complainant did not change its front until the surprising discovery made by its engineer on July 2, 1896.

On the contrary, though advised by Mr. Clark, as claimed by Mr. Kidder, on February 8, 1896, of the effect of the case of Ice Co. vs. Ice Co. on the former advice which Mr. Kidder claims he received from his counsel and though he immediately thereon conferred with his superior officers upon the situation, the complainant carefully refrained from giving notice of any kind to the defendant the Cleveland Company, or interfering with or interrupting for a single moment of time the constant work of exploration and development then being carried on by the defendant with a full knowledge thereof of complainant's officers. In June, 1896, Mr. Kidder actually negotiated with the defendant company for a formal lease of a right of way across the now disputed territory for his railroad track.

Jopling, pp. 207-208.

That railroad track and embankment had been

completed during the winter of 1895-6, under a previous grant of right by the Cleveland Company, and in June, 1896, it was being operated by complainant company, and it has continued to occupy and operate that railroad track to this day.

In the month of September, Mr. Kidder had further talk with defendant's manager at that time, with reference to that same lease. Did he then caution defendant to do no further work, of development in that territory? Did he say complainant company had previously been deceived as to its rights and proposed to claim them. Not one word. He merely said he was not quite ready yet to close a formal written lease for the railroad track, without giving a reason.

Jopling, p. 208.

In the same month of September, on the 14th day of that month, Mr. Kidder had a further conversation with defendant's manager, in which complainant requested the defendant to arrange to leave a certain block of ore under the section line, in the bed of the lake between their two lines as divided by the section line, to accommodate complainant company and prevent complainant from losing a portion of its ore, should the defendant not grant the accommodation.

Jopling, p. 209; and Map, Def. Ex. 24, at p. 210.

Not until November following did Mr. Kidder post a notice directed to Mr. Mather, president of the Cleveland Company, giving the first intimation of complainant's present attitude. And the fact will be remembered (it is referred to in the statement of facts), that Mr. Kidder remarked, on posting this notice, that Mr. Mather would be very much surprised when he received it.

VII.

THEREFORE, COMPLAINT IS ESTOPPED BY ITS LACHES FROM THE FIRST DAY OF MARCH TO THE FIRST DAY OF NOVEMBER, 1896, FROM MAKING A CLAIM IN THIS SUIT.

The failure of a party to assert a right while another party in good faith goes on to make the property more valuable, cuts him off by his laches from afterwards claiming such right.

Twin Lick Oil Co. vs. Marbury, 91 U. S., 587.
Royal Bank vs. Grand Trunk Ry., 125 Mass., 490.
Clegg vs. Edmonson, 8 DeG. M. & G., 787.
Pendergast vs. Turton, 1 You. & Coll. Ch., 97.

For the sake of argument let the pumping contract and all the facts pertaining thereto be blotted out. Take from the case the triangle south of the line, used and wrecked by complainant, and which it does not offer to and cannot restore; and all the work done by the Cleveland Company in this territory prior to March, 1896; and all the acts and conduct of the several parties prior to that date, and start complainant with a clean record on the 8th day of February, 1896, when by Mr. Kidder's own claim he was advised of his alleged rights under Ice Co. vs. Ice Co., if he ever had any such.

There is yet enough in the conduct of complainant company following that date to deprive it of a remedy.

Mr. Kidder testified that when he was informed in the year 1887 or 1888 of the case of Clute vs. Fisher, and having decided to act upon that case, he immedi-

ately removed to the south of the line, the buildings erected by his company upon the ground made north of the section line between complainant and the Lake Superior Iron Company. He does not appear to have consulted his superior officers with reference to that immediate movement. He explained in his testimony already referred to, that he thus acted promptly to save his rights in case Clute vs. Fisher should turn out to be the law of the state and should not be overturned.

Why did not Mr. Kidder act with equal promptness on February 8, 1896, in advising the defendant Cleveland Company of a change of positions and a change in his belief?

His own previous action in 1887 concludes him upon any claim which might be made that he did not understand the propriety of immediate action to save rights involved.

Why should he not have been as fair in his treatment of the Cleveland Company in 1896 as he was in the treatment of his own company in 1887?

He knew that the Cleveland Company was continuing every day the work of development in the now disputed territory. He knew that every week of time might develop great changes in values under the influence of that development work. He knew the hazards of mine development at the expense of the Cleveland Iron Mining Company were still continuing. He not only took no steps to treat them fairly under the influence of his full and complete information on the situation, but if anything could lead the Cleveland Company to fancy itself absolutely secure in its work, the conduct of Mr. Kidder during that period of time up to November following, was well calculated to do so.

Did the complainant company delay because it

had not yet been advised that the Cleveland Company had developed anything of value worth fighting for?

The considerations presented in the Marbury case, with such overwhelming force as to inspire conviction, may be again applied under this subdivision to characterize the conduct of the complainant company during the time in question as so inequitable and unfair, in view of its present effort by this bill, as to conclusively bar it from relief.

The principle, that he who seeks equity must do equity, has been entirely ignored in the bringing of this bill.

And with such a load of equities on the part of the defendant to overcome, without presenting on his own side a single equity or one single effort to do equity, what is it which the complainant asks this court to do. When the lake was full of water in its original condition it would have been difficult for any court to find a boundary in the lake. By the continuous acts of the shore owners during several years, the waters of the lake were gradually lowered, so that the actual knowledge of the original shore lines does not now seem to remain in the mind of any living witness. On finally draining the lake, in 1892 shore lines in many places were so obliterated that it is impossible now to find them with any degree of certainty.

In the original condition of this lake, when the soil in its bed was virgin and untouched, it would have been practically impossible for a court to do justice to all parties in undertaking to divide that lake bed with reference to its original shore line. In that bed are many ore veins, with vast fields of worthless rock. By the method invoked by complainant for dividing that lake bed, any attempted division of it could scarcely

fail to do injustice to one or the other of the parties, where a single acre or half acre might be worth all the other acres together.

How much more arbitrary, uncertain and unjust does such a method now appear, when a court is first asked to take it, with the present conditions.

VIII.

It is persistently urged by complainant that the acts and conduct of complainant's officers were without authority to convey any interest in land, because of the statute in Michigan requiring the vote of three-fifths of the capital stock to make a conveyance of corporate property valid. This objection is even applied to the pumping agreement.

The learned counsel for complainant contends that even a seal on the pumping agreement does not import that it was the seal of the corporation, and that what purports to be a seal attached to a corporate contract does not estop the corporation from challenging the power of the officers to make the contract.

The point is made in behalf of complainant with singular oblivion to the fact that the agreement in question was put in evidence by complainant in this case, which fact proves the seal, the authority of the officers to make the contract, and estops the complainant from attacking it for any cause whatever, as the contract which it purports to be and duly authorized for that purpose.

It seems needless to cite authority to such a proposition.

But further, the entire argument of complainant upon the proposition considered, is foreign to the cir-

cumstances to which the proposition is applied. The conveyance of corporate property by deed is one thing, an estoppel upon that corporation by its acts and conduct in a suit in equity brought by it to obtain relief is an entirely different matter.

Complainant's local officers were put in possession of its property with apparent authority to do all things in which conduct could affect the rights and obligations of complainant company.

One is estopped by the act of his agent from denying the authority of that agent in the doing of such acts, the making of such admissions as come within apparent scope of the authority of such agent.

McCormick vs. Bay City, 23 Mich. 457;
Brown vs. Kent, Probate Judge, 42 Mich. 501.

In Butler vs. Iron Cliffs Co., 96 Mich. 70, a contract existing solely in letters and oral conversations of the president of a mining corporation, was held sufficient upon which to compel the conveyance by the corporation of its lands, the complainant in the case having paid his money therefor. And there was no proof of the authority of the president in that case to act.

Sufficient authority of an agent is always presumed when the facts are such from long continuance that the principal must have been supposed to have full knowledge thereof and the benefits of whose act he has received and failed to return. In such a case ratification will be presumed. Acquiescence is a substitute for knowledge of the fact, and knowledge with acquiescence amounts to ratification.

Columbet vs. Pacheco, 48 Cal. 395;
Chicago &c. Ry. vs. People, 91 Ill. 251;
Diehl vs. Zanger, 39 Mich. 601.

It seems idle to be compelled to argue that the complainant knew of all the acts of its officers and ratified them, for it received the benefits therefrom.

It seems idle also to argue the question at all, because the question now arises whether a complainant can obtain relief in equity to escape the enforcements against it of contracts and conduct of its officers thereunder, while it neither offers to restore nor point out how it could be able to restore the other party to its former condition, the changes in conditions having been brought about by the contracts and acts fully ratified by the complainant now seeking to attack them.

Whether or not referable to the pumping agreement in explicit terms, nevertheless the subsequent acts of complainant's officers, their declarations, tresspass settlements, map making, mining of iron ore from the triangle, obtaining railroad right of way—all these were done and declared and had effect thereby, under the sanction of that contract with full knowledge of the complainant of the fact.

IX

Complainant is barred from maintaining this action because having obtained and now occupying disputed territory under a lease from defendant, it is estopped from disputing defendant's title.

Taylor Landlord and Tenant (7th Ed.) secs. 629, 705.

Under the lease obtained from defendant for a right of way, the complainant company is now actually in occupancy of the disputed territory. And the admission in that lease of defendant's title to that

portion actually occupied, extends to every portion of the territory occupied under the same title.

The Circuit Court, without passing on the other questions in this case, held the complainant estopped to claim this land, and we append hereto the opinion delivered there. Quite a few of the authorities cited by the court we have not again cited and we adopt the opinion of the court as a part of our argument on the question of estoppel. It presents strong and cogent reasons why the complainant's bill should be dismissed.

THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE, IN CHANCERY.

The Pittsburgh & Lake Angeline Iron Company,
Complainant,

vs.

The Cleveland Iron Mining Company, and The Lake Superior Iron Co.,
Defendants.

In disposing of this case I shall first discuss and determine the question of estoppel, for if the complainant is estopped to now set up title in itself to the lands lying north of the south line of Section 10, the other questions become unimportant. Is the complainant estopped by its undisputed acts, conduct, silence and acquiescence in the premises? The maxim that "where one of the two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who by his own act has occasioned the confidence and consequent injury of the other," applies, it is urged by the defend-

ants, to the complainant here. It is urged that the complainant allowed the defendants to go on and expend large sums of money to explore for iron ore in the bed of this lake, upon the understanding that the bed of the lake north of the south line of Section 10, where such exploring was done, belonged to them and not the complainant, and that the defendants would be entitled to remove the ore which should there be found. And it is said that the question here is not whether the legal title to the bed of the lake passed to the defendants by the acts which it is claimed constitute the estoppel, but that the question here is, upon a bill in equity filed by the complainant for the purpose of making available to itself the benefits of the explorations and improvements which have been made by the defendants, upon the understanding with the complainant that these explorations and improvements were carried on for the benefit of the defendants, upon lands to which the complainant made no claim of title.

And it is urged by the defendants that for the complainant to change its position now, after the explorations and expenditures have been made and the ore discovered, by seeking to appropriate the fruits of such explorations, expenditures and discovery, and deprive the defendants of the benefits thereof, is to work a fraud upon them, which a court of equity will not help it to accomplish. It seems to be the law that a party will not be permitted to recover lands which he has encouraged another to occupy and improve, even when the encouragement was given under the influence of a mistake and in ignorance of his own better right.

2 Herman on Estoppel, sec. 954.

And cases cited in note 4.

I do not think that it is necessary to find that any actual fraud has been practiced by the complainant, in order to apply the doctrine of equitable estoppel to its conduct.

A party is estopped from contradicting his own representations, on the strength of which another has acted, even where such representation was made in good faith, and in ignorance of the facts.

Sweezy vs. Collins, 40 Iowa, 540.

Ignorance of the law, or a mistake as to the party's rights, will not protect one from a bar by estoppel, when, but for such plea of ignorance the law would enforce the estoppel for acts and conduct, when to refuse to do so would be inequitable.

Tilton vs. Nelson, 27 Barb., 595.

Storrs vs. Baker, 6 Johns. Ch. 166.

Town vs. Needham, 3 Paige, 555.

The question is not did the complainant practice a fraud upon the defendants in leading them to believe that it would not, and did not claim any land lying north of the south line of section 10, but it seems to me rather that the question is, whether the complainant would now be guilty of a fraud in making such claim, in view of all that has been said and done upon that subject, and in view of the course of dealing between the parties for years respecting that territory.

As Herman says, at section 736:

> "The fundamental principle upon which this doctrine is based is the equitable one, the suppression of fraud and the enforcement of honesty and fair dealing. The ground upon which a party is estopped from proving that his representations, on which another has acted, were false, is that to permit it is contrary to equity and good conscience."

Again at section 759:

> "If a man, either in express terms, or by conduct, makes a representation to another of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

Then again:

> "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."

Section 762:

> "The exclusive warrant for an equitable estoppel is, that it is necessary to sustain the cause of right and justice. Where the acts and representations of a party must have influenced the other to do acts which he would not have otherwise done, and where a denial or repudiation must operate to the injury of such other party, the estoppel is created."

The above equitable doctrine is nowhere more clearly stated than by Cooley, J., in Furguson vs. Milliken, 42 Mich. 443: "Estoppels rest upon the protection of equities." In many cases the word willful is used, as though the representations or acts of the party must have been made willfully or with intent to deceive. That was the term used in one of the leading cases—Pickard vs. Seares.

In Freeman vs. Cooke, 2 Ex. 654, Parke B. referring to "willfully" as used in Pickard vs. Seares, said:

> "If, whatever a man's intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant that he should act upon it, and he did act upon it as true, the party making the representations would be equally precluded from contesting its truth. In short, the representations are to be regarded as 'willful' when the person making them meant them to be acted upon, or if, without regard to intention he so conducts himself that a reasonable man would take the representations to be true, and believe it was meant he should act upon it.' See also Herman, Secs. 754 and 772 on the same subject.

All that is essential is, that there should be such conduct on the part of the party against whom the estoppel is alleged as would make it a fraud for him to gainsay it.

Now apply the above rules to the conduct of the complainant in its dealings and actions with the defendants with reference to the territory lying north of the south line of section 10. Is there any doubt, from the uncontradicted evidence, that in all the dealings, acts, negotiations, conversations, arrangements and agreements, from first to last, between the parties, it was always understood that the section line was the northern limit of complainant's territory? Most certainly not. It does not meet the question to say that many of these acts of the agents or officers were not sufficient to convey title to real estate. The evidence shows that not a single act of any agent or officer of complainant relating to their dealings with defendants upon this subject, was ever repudiated by the complain-

ant: but on the contrary they all seem to have been acquiesced in, and ratified. It is not a queston of power or authority to convey lands, but it is a question as to whether complainant should not be equitably estopped from gainsaying what it has done, and what it has permitted defendants to do with reference to this property, in the belief that complainant laid no claim to anything north of said section line.

A brief review of some of the authorities on the subject of equitable estoppel may aid us.

In Dickenson vs. Colgrove, 100 U. S., 578, A, the owner in fee of lands in Michigan died in February, 1853, leaving his two children B and C, his only heirs at law. On March 3d, C and her husband conveyed the lands by warranty deed to D, who put it upon record March 6, 1854, and entered into possession of them April 1st of that year. D, learning of the existence of B, and that he lived in California, wrote to him, inquiring whether he made any claim to the premises. On April 1st, 1856, the latter addressed from California to his sister C, in Michigan, a letter, wherein he said: "You can tell D, for me he need not fear anything from me. * * * You can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it."

The contents of that letter becoming known to D, he, for a valuable consideration and by deeds with covenants of warranty, conveyed in fee the lands to E and others, who thereunder occupied and improved them. July 9th, 1865, B conveyed the undivided one-half of them by quitclaim deed to F, who March 6, 1873, brought ejectment. Held, that B's

letter of April 1, 1856, operated as an estoppel in pais, which precluded him from setting up a claim to them, and was an available defense to the action. Justice Swayne delivered the opinion of the court. He says:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden * * * This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. * * * In Faxton vs. Faxton, 28 Mich., 159, a mortgagee holding several mortgages prevailed on a son of the deceased mortgager, then intending to remove to a distance, to remain on the premises and support the family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years the mortgagee proceeded to foreclose. He was held estopped by his assurances upon which the son had acted. The court said: "The complainant may have estopped himself without any positive agreement, if he intentionally led the defendants to do, or abstain from doing anything involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages."

In Harkness vs. Toulmin, 25 Mich., 80, and Trues-

dale vs. Ward, 24 Mich. 117, this principle was applied in the former case, to the extent of destroying a chattel mortgage, and in the latter, of forfeiting rights under a land contract.

There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

See also Kirk vs. Hamilton, 102 U. S., 68-79.
Maxwell vs. Bay City Bridge Co., 41 Mich., 453, at pp. 466-467.
Cleveland vs. Cosgrain, 92 Mich., 139-153.
McVicker vs. Filer, 31 Mich., 304 at 308.
State of Michigan vs. F. & P. M. R. R. Co., 89 Mich., 481 at 487.
2 Herman on Estoppel, Secs. 932, 933, 934, 935, 936, and 954.
Petue vs. Fater, 21 Wend., 172.
Watson's Executors vs. McLaren, 19 Wend., 563.

The principle involved is that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest inten-

tion to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case will not be permitted afterwards to assert his title and recover the property, at least without making compensation for improvements. It will be observed that in this case the complainant does not by its bill make any offer to reimburse defendants for improvements made on the property nor for money expended either in explorations or under the pumping contract. He that seeks equity should at least offer to do equity in his bill of complaint.

The complainant not only sets up the pumping contract in its bill of complaint, as a binding and valid agreement, but it offered it in evidence as a part of its case, evidently relying upon its fairness, legality and binding force on all of the parties interested in the subject.

As in Maxwell vs. Bay City Bridge Co., 41 Mich., 466, so here, money has been expended by defendants in reliance upon complainant's assent that it had no claim to property north of the section line.

See Manistee Mfg. Co. vs. Cogwell, 103 Mich., 602.

Let us examine the pumping contract in the light of this case. If there was an agreement, express or implied, fixing the line, in which there has been acquiescence, that is sufficient. An acquiescence under circumstances which imply an assent, and which has been followed by a change in the condition of the parties, made on the strength of such acquiescence, is sufficient. The above named case was reversed because the Circuit Judge erroneously directed a verdict for the defendant, instead of submitting the question of acquiescence to the jury.

If it is conceded, as urged by complainant's counsel, that the primary object of the parties in making the pumping contract was not to settle or dispose of any disputed question of riparian rights nor boundaries, still the question remains, was it not the intention of the parties to that instrument to so apportion the cost and expense of that work as to make the south line of section 10 the boundary line? Was not this fact, that the south line of section 10 was the boundary, made the basis of the contract in the apportionment of the expense and cost of that work? If so, was not this such an implied agreement and recognition of the line as fixed and established it within the meaning of the language of the Supreme Court in Manistee Mfg. Co. vs. Cogwell?

Is not this a fair test to apply: would the defendants have entered into and made the contract (pumping) on the terms therein contained, had the complainant claimed to them that it owned the territory now claimed, lying north of the south line of section 10, and that it proposed to extend its line to the so-called equitable center of the lake? Most certainly not. There is ample reason to say that defendants would never have made this agreement had the complainant informed them that it claimed to own a large part of the most valuable portion of the land in the bed of the lake north of the south line of section 10.

Judge Campbell says in Cronin vs. Love, 38 Mich., 385, that: "Estoppels when allowed must be based on something else than the silent permission of improvements by a party who has not acted in bad faith, or done any act which the other party had a right to regard as meant to govern his conduct."

Apply that rule to the pumping contract, so-called.

Was not the recognition of the south line of section 10 as the true boundary, something more than silent permission of improvements? Was not this very line made the basis of the agreement? It seems to me so, and it appears clear to me that it was an act on the part of the complainant which the other party has a right to regard "as meant to govern his (its) conduct."

In Bird vs. Stark, 66 Mich., at page 656, Judge Campbell, speaking for the court, says, "It is undoubtedly true, under our decisions, that, to make an arrangement less than fifteen years old binding, it must have been made with the understanding that it should be so regarded." Apply that test to the pumping contract. Can any fair-minded man read it without being satisfied that it was made with the understanding that the S. line of section 10 was to be regarded as the true line of ownership? It seems to me he cannot.

It is urged by complainant's counsel that at the date of the pumping contract, all of the parties considered the questions of boundaries and riparian rights put at rest by the case of Clute vs. Fisher and that the doctrine of mutual mistake applies.

I do not remember a word of evidence tending to show that either of the defendants had ever heard of the case of Clute vs. Fisher at the date of the contract, nor that there was action had by the parties in making the contract, in mutual ignorance of the facts.

It is essential to the granting of relief in equity on the ground of mistake that it should appear that there was error on *both* sides, and the mistake alleged must be proved distinctly, when not admitted.

Ludington vs. Ford, 33 Mich., 123.

This doctrine has been repeatedly stated by the Supreme Court, both before and since the decision of

the above named case. The complainant, therefore, is in no position to invoke the aid of the court upon this ground.

Further than that it has made no such claim in its bill of complaint. The complainant actively assented the development work of both defendants during nearly the whole year of 1896, and long after Mr. Kidder on his own claim had learned of his so-called mistake.

A single month of such delay, in the face of expensive development being carried on by the defendants, would defeat the effort to profit by it in a court of equity.

As I have before said no attempt is made in this case to impeach the pumping contract. This can only be done by a suit in equity to reform it. Over four years' acquiescence under the operation of this contract, witnessing the large expenditure of money, a complete change of the surface conditions, great changes in value by development undertaken at great hazards, seem to make the possibility of the claim of mistake in this contract improbable. Further, even in the presence of honest mistake, no court could reform such a contract without restoring the parties to their original status as to rights and benefits, and that could not be done in this case, either under the pleadings or proofs.

There is much force in the defendant's position that the complainant is estopped upon the ground that a license was given to both defendants to explore for ore for the purpose of discovering and removing ore, and upon such license a large expenditure has been made, by means of which the ore was discovered.

The license is not revokable after such expendi-

ture, and discovery of ore has been made, at least without an offer to reimburse defendants and place them in their original position. To do this would be very difficult, if not impossible, on a bill framed for that purpose.

A reference to some of the cases that discuss the doctrine of executed or irrevocable license may be profitable.

In Marble vs. Whitney, 28 N. Y., 297, it was held that when commissioners of highways had laid out a highway over premises of the plaintiff upon his personal consent, that he could not revoke such consent after the road was laid out and the alteration made. And it was said: "If the commissioners act immediately on the faith of the virtual consent, by laying out the road, or making the alteration, he (plaintiff) will be estopped from denying the legality of the act."

In Western Union Telegraph Company vs. Bullard, 31 Atl. R. 286, (Vt.) a party had given permission to a telegraph company to construct its line in front of his land on a highway, and the company had erected its line and incurred expense, acting on his consent; it was held that his consent was irrevocable at that stage of the work, certainly without any offer to place the company *in statu quo*. "The doctrine of equitable estoppel should be applied." Many authorities are cited. In the same case this language is quoted with approval:

> "Equity will decree specific performance when compensation in damages would be inadequate for the purpose of justice, and that partial execution of a parol agreement may supply the want of a writing, and withdraw the case from the operation of the statute of frauds.

> * * * When the revocation of a license would operate as a fraud, a chancellor will turn the licensor into a trustee *ex maleficio* for the licensee on principles analogous to those which apply when the owner of land stands by and allows another person to make improvements on it under the belief that he will be allowed to reap the fruits of his labor and expenditure."

In National Water Works Co. vs. Kansas City, 65 Fed. r. 691, the M. R'y Co. permitted a Water Works Co. to construct a pipe along the right of way to which the Railway Co. had title in fee. With the full knowledge of the Railway Co. the Water Works Co. expended considerable sums in the construction of such pipe line, and continued, without interference, to use the same for a number of years in supplying a large city with water. Held, that the Railway Company would be estopped to revoke the license thus acted upon. In that case Justice Brewer quotes the following language with approval:

> "From the cases which have been cited, we may deduce two things. * * * A license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, or placed with his assent, in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule that no one can recall a promise or declaration made with a view to influence the course of another after he has acted upon it, and placed himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises under these circumstances, to prevent the legal title from being used as a means of

injustice." Justice Brewer then proceeds as follows:

"There is nothing technical or arbitrary in the rule thus laid down, but it is founded on obvious principles of right and justice. It would be intolerable to permit the railway company after assenting to the construction of this flow line at such expense—a flow line by which supply works were connected with the distribution of a large city—and also assenting to the use of its right of way for such a purpose for a number of years, to withdraw the assent, and treat the connection so necessary for the successful operation of the water works system. Acts speaks louder than words, so conduct is equally potent with writing, and the conduct of the railway company has been such that a court of equity would unhesitatingly say that it is estopped from asserting that it had failed to grant in the proper manner the right to such use of the right of way."

In Norfolk & W. R. Co. vs. Perdue, (W. Va.) 23 S. E. R., 755, it was held that, when a party who claims to be owner of a tract of land has notice of the fact that a railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his rights, and assists in the construction of said tunnel from its commencement until its completion, and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages. That when one of two innocent persons, that is, persons each

guiltless of an intentional moral wrong must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible. The court says:

> "The bill alleges that the appellee was cognizant of the manner in which appellant claimed to have acquired title to said strip of land, and must be presumed to have known the land he claimed, and yet with all this knowledge he worked in silence for the company that constructed the tunnel, and set up no claim to any portion of said strip until after the tunnel was completed and the railroad constructed through the same. If he had objected when the work was commenced, the appellant might have made other arrangements, or perhaps changed the route. Would it then be doing equity to allow the appellee to wait in silence until the road was located, and the tunnel completed, and then assert his claim for damages? Surely not."

Herm. Estoppel, 776, on this point thus states the law:

> "If a person having a right, and seeing another person about to commit or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term acquiescence, and in that sense it may be defined as quiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. In the case of

Boardman vs. Ry. Co., 84 N. Y., 182, Miller, J., in the opinion of the court says:

"The principle applicable to such a case is laid down by Lord Denman in Pickard vs. Sears, 6 Adol & E., 174, as follows: 'The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time: and Miller, J., adds: 'Nor is it essential to an equitable estoppel that the parties should design to mislead, and it is sufficient if his acts are calculated to mislead, and have misled another acting upon it in good faith, and exercising reasonable care.' So also, the case of Jowers vs. Phelps, 33 Ark., the law in regard to estoppel in pais is well stated by English, C. J., as follows: 'Estoppels in pais depend upon acts which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud.'"

In Southern Marble Co. vs. Damiel, 21 S. E. R., 531 (Ga.), the plaintiff brought his petition against the Southern Marble Co. to recover damages alleged to have resulted to him from the diversion of water by defendant and for injunction to prevent any further

diversion. It was contended on the part of the defendant that the plaintiff was estopped from claiming damages, because, when the ditch was being dug, he knew the purpose for which it was intended, and not only stood by and saw the work going on, but was actually employed by defendant to assist in digging the ditch, and was paid for this service.

The court said: "If this be true, we think the plaintiff could not afterwards complain that the ditch diverted water from his premises. It would be inequitable and unjust to allow him to recover damages for an injury resulting from this cause. He could not stand by while the ditch was being constructed at a heavy expense, or aid in the digging of the ditch, receiving compensation therefor, and making no objection, and then recover damages for the diversion of the water from his premises, when he knew or ought to have known that this would be the result of the construction of the ditch. Under these facts, he would be estopped from obtaining an injunction against the use of the ditch and the continuous diversion of water thereby."

In McBurm vs. Thompson, 37 Pac. R. 57 (Oregon), riparian owners and their grantors had for eight years acquiesced in the diversion by a person who was not a riparian owner, of a part of a stream, and such person had yearly aided in keeping the channel of the stream open, and expended money on his farm, which would have been worthless without the water, and it was held that a court of equity would not enjoin a further diversion of the water at the suit of such riparian owners. The court says:

> "The defendant thus encouraged by the plaintiff's voluntary acquiescence and partici-

> pation in a common purpose, laid out their money and expended their labor in making homes for their families, under an obvious expectation that no obstacle would afterwards be interposed to prevent their enjoyment. The plaintiff's objection, in view of the unreasonable delay, and of all the circumstances of the case now comes too late; and under the maxim that 'he who is silent when he ought to speak shall not be heard to speak when he ought to keep silent,' he can have no standing in a court of equity to enjoin a diversion and use of the waters of a stream that he and his grantor have tacitly encouraged."

See also Flick vs. Bell, 42 Pac. R., 813 (Cal.) and cases there cited.

Clark vs. Glidden, 15 Atl. R., 358 (Vt.)
Morton Brewing Co. vs. Morton, 20 Atl. R., 286 (N. J.)
Nowlin vs. Whipple, 22 N. E. R., 669 (Ind.)
Saucer vs. Keller, 28 N. E. R., 1117 (Ind.)
Appeal of Clelland, 19 Atl. R., 352 (Pa.)

In this case the doctrine of executed or irrevocable license is fully discussed, and many Pennsylvania cases are cited.

It seems to me useless to cite further authorities. I shall conclude by citing the case of Twin-Lick Oil Co. vs. Mabury, 91 U. S., 592-3. That was a case in which the court estopped the complaining party from litigating a title to land valuable only for mining purposes, who had stood by and witnessed its development by defendant claiming title:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil

> wells. Property worth thousands to-day is worth nothing to-morrow: and that which would to-day sell for a thousand dollars at its fair value may, by the natural changes of a week, or the energy and courage of a desperate enterprise in the same time, be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the title to assert an ownership in such property to voluntarily await the event and then decide when the danger which is over has been at the risk of another to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value the class of property considered subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

The language of the court above quoted applies with striking force to mining property situated in this district. All of the parties to this suit realized the advisability of pumping the waters out of Lake Angeline to permit the taking of ore from beneath its bed. The complainant had felt so strongly the necessity that before the pumping contract was made Mr. Kidder, complainant's agent, considered the advisability of building a cofferdam across the southeast arm of the lake, so that the water could be pumped from that portion of the arm over the deposit discovered and opened by his company. At that time no deposit of ore was known to exist north of the line, anywhere near it. On March 16, 1892, the three companies joined in a petition to the common council of Ishpem-

ing asking permission to pump dry Lake Angeline for their mutual benefit, stating therein that the three companies owned all the land around the lake; that the south section line of 10 produced through the waters of the lake was the dividing line between the property of complainant and the defendant, the Cleveland Iron Mining Company, where that line was produced south of the east half of 10, and between complainant and the defendant, The Lake Superior Iron Company, where that line was produced south of the west half of section 10. Undoubtedly the assent of the city of Ishpeming was by all of the parties considered necessary, as preliminary to the contract. The petition conclusively presupposes an understanding between the three companies prior to the filing of the petition that their respective boundaries should be recognized and acted on as therein stated.

The petition was granted by the common council March 16, 1892. On March 17, 1892, the contract was drawn, which was duly executed by the proper officers of the respective companies in the most formal manner, and after the lapse of many months by the complainant.

I am aware that titles to land cannot in Michigan be maintained upon an estoppel, and where one by his conduct is precluded in law from asserting his title in property, there is strictly no transmission of title; yet this is a mere technicality: the legal consequences are precisely the same, and for all practical purposes the estoppel works a conveyance.

I shall therefore spend no time in discussing the question, of whether or not the pumping contract was so executed as to convey real estate under the mining laws of this state. It is very clear to me that it was

properly executed, so as to be perfectly legal and binding upon the parties for all the purposes intended. The same act and conduct that will estop an individual will estop a corporation. It was a sanction and ratification of all the steps that led up to its execution. Whether referable to that pumping contract or not in explicit terms, the subsequent acts, declarations, trespass, settlements, map making, mining of ore from the triangle, obtaining of railroad right of way, and other similar acts of the local officers of the complainant were done, and defendants were affected thereby, during the existence and under the apparent sanction of the pumping contract, executed in the manner stated and by the officers of the complainant duly authorized to carry out the terms of the said contract. Every act of every officer and agent of complainant in connection with the recognition of the south line of ten as its northern boundary, so far as the evidence in this case shows, has been ratified and sanctioned by the complainant. Therefore the sanction of that pumping contract extends to every act urged against the complainant company as an estoppel. All of the subsequent acts, declarations and statements are consistent with the contract, and are characterized by it.

Many other grounds are urged by defendants' counsel as reasons why the bill of complaint should be dismissed. I am content to place my decision on the ground herein stated.

The bill will be dismissed with costs to the defendants, to be taxed.

July 17th, 1897.

J. W. STONE,
Circuit Judge.

GEO. HAYDEN,
Solicitor for Defendant,
The Cleveland Iron Mining Co.

J. H. HOYT,
Of Counsel.

Copy of stipulation correcting omission from printed record.

Marquette, Mich., Feb. 12, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,

vs.

THE CLEVELAND IRON MINING COMPANY, and THE LAKE SUPERIOR IRON COMPANY.

Whereas it appears from the printed record in said cause in said court on page 219, that three letters written by the witness Bradt, to James E. Jopling, dated respectively December 12, 1895, March 6, 1896, and July 15, 1896, were offered by defendant's counsel and received in evidence as Exhibits 31, 32 and 33; and Whereas in the printing of the said record, as appears by the said page of the said record, Exhibits 32 and 33 were omitted in the printing:

It is hereby stipulated, by and between the solicitors for the complainant and the solicitors for the defendants, that said Exhibits 32 and 33 may be read upon the argument of said cause in said court, the same as though appearing in the said printed record, at the place they were offered by Mr. Hayden, solicitor for the defendant, The Cleveland Iron Mining Company.

Said Exhibits are as follows:

DEFENDANT'S EXHIBIT 32.

Ishpeming, Mich., March 6, 1896.

Jas. Jopling, City:

Dear Sir: I believe this sketch contains everything on surface and underground that you do not now have.

I beg pardon for having been so long in getting it to you.

Respectfully,

E. F. BRADT.

DEFENDANT'S EXHIBIT 33.

Ishpeming, Mich., July 15, 1896.

Mr. Jas. E. Jopling, City:

Dear Sir: I am going to locate the pipe line from where it enters the right of way at the farther end of the track, to where it leaves the parcel of land our company proposes leasing from your Co., and wish to put it on the tracing I have given you.

Will you please be so kind as to let the bearer have it, also the notes of the description of the land, and right of way.

It is possible, after taking up the matter again with Capt. Walters, we may wish to make an alteration, especially the right of way at the farther end of the track.

Respectfully,

E. F. BRADT.

J. O. CLARK,

Solr. for Compl't.

HOYT, DUSTIN & KELLEY,

Solrs. for Defendant The Cleveland Iron Mining Co.

Solrs. for Defendant The Lake Superior Iron Co.

No. 260.
Brf. of Dustin for Cleveland.
FILED
FEB 19 1900
JAMES H. McKENNEY
Clerk

SUPREME COURT

Filed Feb. 19, 1900.

UNITED STATES.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
vs.
THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY,
Defendants in Error.

October Term, 1899.

No. 260.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Brief for the Cleveland Iron Mining Company, Defendant in Error, on motion to dismiss the Writ of Error and on Hearing.

A. C. DUSTIN,
Of Counsel.

HOYT, DUSTIN & KELLEY,
Solicitors for the Cleveland Iron Mining Company.

THE PRESS-GAZETTE-WATSON CO., CLEVELAND, O.

Supreme Court of the United States.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY, Plaintiff in Error, vs. THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY, Defendants in Error.	Case No. 17,363. October Term, 1899. No. 260.

BRIEF FOR THE CLEVELAND IRON MINING COMPANY, DEFENDANT IN ERROR, ON MOTION TO DISMISS WRIT OF ERROR AND ON HEARING.

STATEMENT OF FACTS.

The complainant here, also complainant below, claiming to own some land which was formerly in the bed of Lake Angeline, a small fresh water lake containing about one hundred and fifty acres located in the municipal limits of the village of Ishpeming, Marquette county, Michigan, filed its bill in equity in the Circuit Court for Marquette county, Michigan, to have its boundaries determined and its lands set off to it in

severalty and for an accounting against the defendants for the ore which they had taken from the land alleged to belong to complainant, averring that the defendants were mining and threatened to continue to mine from complainant's property.

The controversy here arises over the boundary line separating the three properties of the three parties to this suit, who together own the whole of the land which was formerly the bed of the lake. The two defendants claim that the south line of section 10 separates their respective properties from the complainant's property.

On final hearing the Circuit Court dismissed complainant's bill from which complainant took an appeal to the Supreme Court of the State of Michigan, where the decree of the Circuit Court was affirmed. The case is here on a writ of error to the judgment of the State Supreme Court on the ground that there was a federal question involved herein which was decided adversely to complainant.

By examining blue print map, Record, page 36 (in all cases in this brief paging referred to is paging at the top of printed Record), it will be seen that Lake Angeline was an irregular lake with a central body and three projecting arms, extending into sections 10, 11 and 15. Complainant owned fractional lots 2, 3, 4 and 5 in section 15, derived by mesne conveyances from the original patentees of the United States government. Defendant, Lake Superior Iron Company, in the same manner had acquired fractional lots 4, 5 and 6 in section 10, and the Cleveland Iron Mining Company in the same manner had acquired "the east half of section 10 and the west half of section 11, in township 47 north, of range 27 west, containing five hun-

dred and forty-five acres and fifteen hundredths of an acre, according to the official plat of the United States government." This land acquired by the Cleveland Iron Mining Company had been entered against it on tax duplicate simply as the east half of section 10 and the west half of section 11, and before the commencement of this suit it had paid taxes on it as thus entered and described for more than fifteen years.

In the year 1886 (Record, pages 186, 190) the Cleveland Company found ore near the north line of the bed of the lake and subsequently opened up a mine there. In order to determine the extent of its deposit and whether there was any ore south of it, at great expense, it drilled through from this mine southward. The Angeline Company knew of this and requested permission to take up the drilling when the Cleveland Company reached the section line. This all occurred long before the pumping contract. The Cleveland Company encountered serious difficulty from caving ground and rock and stopped a little short of the section line, having discovered only some lean ore. The Angeline Company upon learning the result, decided not to continue boring. (Record, pages 117, 118 and 192.) As early, therefore, as this date complainant was recognizing the section line as the boundary.

By diamond drilling the complainant company, in the year 1890, discovered ore near the south border of the lake. Shortly after it put down a shaft to better conduct explorations and opened up a mine. (Record, page 98.) It became apparent late in 1891 or early in 1892 that this ore body extended under the water of the south arm of the lake and the Angeline Company wished to have the lake pumped

out. At one time, despairing of getting the other two companies to join with it, it contemplated putting a coffer dam on the section line, dividing sections 10 and 15, for the purpose of keeping back the water of the lake and then pumping out the water on its side of the dam, but the parties finally agreed to unite and pump out the whole lake. In addition to the boundaries, if they could be said then to be in dispute, two other questions were, necessarily, to be settled: The proportions in which the parties should bear the first cost of pumping out the water, and how, thereafter, the expense of keeping the lake bed dry should be borne. Both of these by the pumping contract were apportioned between the parties upon the understanding that the section line constituted the boundary between their properties. Not only does this fact appear from the oral evidence of the complainant's own witnesses (Record, page 103), but it appears from all the writings which related to the pumping of the lake. They consist in brief of defendant's exhibit "3," being the complainant's proposition to the Cleveland Company; the petition to the village council wherein the boundaries of the several properties are specifically set out; the pumping contract itself, wherein the recitals and the agreement clearly show this fact; the letter of the president of the complainant company in the August following, wherein he repudiated all concern in anything that took place north of the section line.

The pump which was necessary to get the water out of the lake was first to be paid for by all three of the parties, but when the permanent drainage commenced the Cleveland Company was to buy the complainant company's part of the pumping outfit, the

complainant company being able, by reason of the peculiar contour of its land, to take care of its part of the permanent drainage by the erection of a flume near the section line. Thereafter the Cleveland Company was to do all the pumping and apportion the cost thereof between itself and Lake Superior Company according to the number of tons of ore taken from the bed of the lake by each.

After the pumping contract was made all three parties prosecuted explorations vigorously. In a short time the complainant company learned that the vein in the south side of the lake was dipping toward the section line in such a way that it might go over the line and notified the Cleveland Company of its discovery. The Cleveland Company requested of the complainant company permission (which was readily granted) to go down into complainant's mine and prospect northward by diamond drilling. At a large expense the Cleveland Company drilled five diamond drill-holes northward, the complainant company, in a neighborly manner, furnishing the power. In return for this the Cleveland Company gave to complainant company maps showing the discovery as made by the diamond drill. The Cleveland Company also, about the same time, put down five holes from the surface just north of the section line and gave to complainant company maps showing the result of this investigation. On all these maps the section line was marked as the boundary.

The Cleveland Company, having in this manner discovered some ore just north of the south line of section 10, was confronted with the problem of how it should take it out. This deposit was separated from the Cleveland Company's mine on the north shore of

the lake by a fold of diorite rock some 600 feet wide. The officers of the Angeline Company discouraged the idea of running a drift across from this north mine, representing to the Cleveland Company that its deposit north of the section line was so small that the expense was not warranted, and the Angeline Company offered to take out that ore north of the section line on a royalty. The Cleveland Company desiring, however, to mine and market its own ore drifted through this 600 feet of solid rock into the ore body north of the section line, and sometime in the year '93 or '94 reached the section line on the first level, and from that time down to the bringing of this suit prosecuted its mining opera ions, extending its drifts and tunnels in every direction for the purpose of opening a mine—creating a mine structure—in order that it might economically thereafter take out the ore. About half of this mine structure was built in solid rock. This diamond drilling, drifting, mining operations, timbering, the building of a railroad some 3000 feet long, an electric plant for handling the ore—were all brought about only by the expenditure of a very large amount of money. This venture was one of the hazards of mining with which all of us have had too often, sad personal experiences, but which, in this case, turned out to be fortunate, and by the year 1896, after some two years of mining operations, it was clearly demonstrated that the Cleveland Company had a large and valuable deposit of good Bessemer ore just north of the section line dividing sections 10 and 15.

The complainant company did not know of the vast extent and size of this deposit until in the summer of 1896. During the exploration and mining the complainant and the Cleveland Company repeatedly

recognized the section line as the boundary between the properties. Thus, in 1894, complainant company trespassed a little over the line, promptly acknowledged the trespass and settled for it. Early in 1896 defendant, the Cleveland Company, trespassed over the line, which trespass was followed by an acknowledgment and settlement. Mining from the same deposit on opposite sides of an imaginary line it became necessary for each company to know what the other was doing and, therefore, there was a mutual exchange of maps from time to time of the mine workings upon all of which the section line was marked as the boundary between the properties. At two different times by joint survey and agreement, the officers of the two companies went into the mine and drove nails upon the boundary line and the miners of the two companies were cautioned to carefully observe this line in their mining operations. The complainant company took a lease from defendant, Cleveland Company, for stock pile grounds of a part of the very land it now claims to own. It also got permission from defendant to build a railroad over part of the very same land. As late as July, 1896, the Angeline Company was insisting upon this boundary line and got the defendant company to agree to leave some of its ore in place in order that the Angeline Company would not lose some of its ore which had, in the mining operations, fallen over the line and was in danger of being covered up. The lease for a railroad which crosses some of this disputed land, was also agreed upon in the summer of '96.

The complainant's bill is filed upon the theory that as a shore owner on the lake, it has riparian rights therein and owns a certain portion of the bed of the lake north of the section line. If this be true, then

the Cleveland company by the same rule, originally owned a certain part of the land south of the section line out of which complainant company has mined all the ore and filled the mine with refuse of various kinds.

The complainant company attempts to excuse all that it has done because of its belief at such time that the decision of the supreme court in Clute vs. Fisher, deprived it of any land north of the section line. The complainant company admitted on the trial that it learned in the winter of '95 of Ice Co. vs. Ice Co., 102 Mich., 228, and received from its attorney, on February 8, 1896, an opinion that the rule announced in Clute vs. Fisher, 65 Mich., 48, had been repudiated. Nevertheless it did nothing until November, 1896. Between February and November operations continued as theretofore: the section line as the boundary was repeatedly recognized; the Cleveland company continued its mining operations, and by the middle of the summer of 1896, had shown for a certainty the vast extent and value of its ore deposit north of the section line.

The complainant proposes to fix a point in the center of the lake as a so-called equitable center and from this point lay off the surface of the lake, the amount of surface area to each to be proportioned to the party's shore frontage. That is the only rule of division suggested by the complainant in its bill of complaint. Lines drawn to this point would deprive the Lake Superior Company and the Cleveland Iron Mining Company from all access to the water for considerable portions of their lake front. (Record, page 81 to 83.) It would also deprive the Cleveland company of its triangular piece below the section line. Whatever the rule may be it is certainly clear that a

shore owner is entitled to access to the water for every foot and inch of his ground.

A motion was made in this case to dismiss the writ of error coupled with a motion to affirm the judgment if this court has jurisdiction hereof. Notice was served on complainant and briefs in support of and in opposition to said motion filed by the parties. This court having ordered that said motion be heard with the case on the merits, we will follow the practice adopted by complainant in its brief filed herein on January 4, 1900, and print one brief covering the motion to dismiss and upon the merits.

II.

THIS COURT IS WITHOUT JURISDICTION AND THE MOTION TO DISMISS SHOULD BE GRANTED.

This court is without jurisdiction to review this case upon the merits, unless,

1. A federal question was raised and decided in the state court: and,

2. The decision of such federal question was necessary to the determination of this cause in the state court, and such decision was adverse to complainant: or, that the judgment as rendered could not have been given without deciding such question adversely to complainant.

Fowler, et al. vs. Lamson, 164 U. S., 252,
Laward vs. Denny, 158 U. S., 180-183,
Hammond vs. Johnston, 142 U. S., 78,
Church vs. Kelsey, 121 U. S., 282,
Clark vs. Penna., 128 U. S., 395,
Gray vs. Coon, 154 U. S., 589,

and other cases too numerous to make citation necessary.

It must affirmatively appear from the record that a decision was made on the federal question, and that such decision was against this complainant.

Detroit Street Ry. Co. vs. Guthard, 114 U. S., 133.

Endowment and Ben. Ass'n vs. Kansas, 120 U. S., 103.

Gray vs. Coon, 154 U. S., 589.

If there was any other question decided by the court which was sufficient to dispose of the case, this court is without jurisdiction.

Kennebec R. R. Co. vs. Portland R. R., 14 Wall., 23.

Clinger vs. state of Missouri, 13 Wall., 257.

Thus where a decision was based on an estoppel, it was held this court was without jurisdiction on appeal.

County of Adams vs. B. & M. R. R., 112 U. S., 123.

The only federal question which can be said to have been involved in this case was the construction of certain patents granting government land to the original patentees from whom, by mesne conveyances, the parties to this suit derived title.

So far as The Cleveland Iron Mining Company is concerned, complainant averred in the bill (see record pages 3, 4 and 5, Divisions III and IV), in substance that the United States government by patent dated July 2, 1850, conveyed to Lorenzo Burnell the fractional east half of section 10 and the fractional west half of section 11, containing 555.15 acres, said acreage consisting in part of fractional government lots fronting on Lake Angeline according to the government survey and that these fractional lots, by mesne conveyances, came to defendant, The Cleveland Iron Mining Com-

pany: that the Cleveland Iron Mining Company has acquired no title to the territory formerly covered by the inland lake except as acquired on account of its ownership of fractional lots 2, 3 and 7 in section 10 and lot 1 of fractional section 11, fronting upon Lake Angeline, and that the only ownership in the lake bed held by the Cleveland Iron Mining Company is by means of riparian ownership and not by metes and bounds and that the Cleveland Iron Mining Company owns "a right to the land to the center of said lake, to a common point of ownership, to be equitably determined between all of the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity."

In the latter part of Division VII of the bill (see Record pages 11 and 12) complainant made the following averment:

> "And your orator alleges that it owns said territory formerly under the water of said inland lake by virtue of its riparian ownership, as abutting owner upon the south side of said inland lake, under the laws of property ownership, established by the decisions of the courts of the State of Michigan and of the United States, as well as other states and countries; and that it has ever been the owner hereof, since it purchased said lots two (2), three (3), four (4) and five (5) of said section fifteen (15), as previously set forth. And your orator alleges that the defendant, The Lake Superior Iron Company, owns, on account of its frontage upon the said inland lake, from its frontage above described on the north-westernly shore of said lake to the said lines of ownership of your orator to the vertical point near the center of said lake, being the point of inter-

section above referred to, and that the defendant, The Cleveland Iron Mining Company, owns on account of its frontage above described on the north-easterly shore of said lake in a southerly direction to the said lines of ownership of your orator to the vertical point near the center of said lake, being the point of intersection above referred to. And your orator alleges that it and the said defendants are the owners of the entire territory, formerly covered by the water of the said inland lake, known as Lake Angeline, and that the exact boundary lines of ownership have never been established and fixed between your orator and the said defendants, and your orator desires that the same may be fixed and established by the decree of this honorable court, in accordance with the principles of law and equity."

In the prayer of the bill complainant asks the court to "decree a designation of the territory owned by your orator and the said defendants by lines that shall equitably locate the territory of your orator and the said defendants," etc.

Defendant, The Cleveland Iron Mining Company, answered this averment of the bill in parts IV and V of its answer (see Record pages 23 and 24), in which it alleged that the patent from the government in terms conveyed the east half of section 10 and the west half of section 11; averred that the government at that time owned all the land around Lake Angeline and intended to grant all the land included within the east half of section 10 and the west half of section 11; denied that there was any fractional lots conveyed to Burnell, the original patentee, and denied that the title the Cleveland company had was that of riparian ownership only, but averred that it received the same

by means of the language contained in the patents themselves.

On the trial of the case (Record, page 33), complainant put in evidence the original patent to Burnell, which described the land owned by the Cleveland Iron Mining Company as

> "The east half of section 10, and the west half of section 11, in township 47 north, of range 27 west, containing five hundred and fifty-five acres and fifteen hundredths of an acre, according to the official plat of the United States government."

Whether the issue so raised called upon the court for a construction of the original land patents issued by the government, and whether such construction raises a federal question we will hereafter consider; for the present, we have to say, first, if the state court made a construction of these patents, such construction was according to the contention of complainant and not adverse to complainant; and, second, that the decision was within the class mentioned by Justice Fuller in Hammond vs. Johnston, 142 U. S., 78, "upon an independent ground not involving a federal question."

This court will examine the opinion of the State Supreme Court to see what was then decided.

> Fire Asso. vs. New York, 119 U. S., 110, 116.
> Wood vs. Skinner, 139 U. S., 293, 295.

If the state court had placed its decision upon a construction of these patents adverse to complainant, the state court might and probably would have dismissed the bill for the reason that the Cleveland Iron Mining Company, by the very terms of its patents, acquired the land north of the south line of section 10. The consideration of questions of boundary settlement, estoppel, pumping contract, laches or anything

else would have been unnecessary. The state court must haved adopted the construction of the patents contended for by the complainant, to-wit, that the original ownership in the bed of Lake Angeline was not conveyed by metes and bounds to any of the parties to this suit, but on the contrary was originally owned by the parties as appurtenant to the grant of riparian rights. No one can read the opinion of either the Circuit Court or the Supreme Court of the state of Michigan and not be convinced that that was the conclusion reached by both courts. So we say, without fear of serious contradiction, that the construction placed by the state courts upon these government patents was favorable to complainant's contention and not adverse to it.

When we look at the briefs filed by the complainant in the state Supreme Court and the brief filed by the complainant here, it is apparent that complainant is attempting somewhat to change its position. In the brief prepared for complainant in the state court by the Hon. Alfred Russell, page 18, he says:

> "This bill is best described as a bill to determine questions of boundary between coterminus proprietors. There is no dispute about the title of either party but only about the boundaries."

In the other brief filed by the complainant in the state Supreme Court and prepared by Mr. Clark it was urged in support of the position then taken by complainant upon his so called 'mode of equitable apportionment', the following:

> "What then is the proper mode of equitable apportionment, or fixing the 'equitable' center and boundary of such ownership among abutting owners?

In the case of Lincoln v. Davis, 53 Mich. 389, 390, Justice Campbell used the following language: 'I agree that it depends on the *law of the state, how far rights may be exercised*, consistently with public easements of navigation, in the submerged lands. But I regard it as *settled by the common law of this state*, that such rights exist so far as they can be reasonably enforced and identified. * * * * ' Judge Campbell then states the *rule for the apportionment of an inland lake*, like the one under consideration in this case, in the following language: "In carrying out lines of ownership in narrow streams, it is easy to find the general course of a stream, and to draw lines perpendicular to that course from the terminal shore lines. But on lakes, all lines from the shore tend to converge in some *central* part of the lake, and while irregularity of shape prevents drawing them to a common center, they must, if protracted, *cross each other* in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area *in proportion to the shore frontage*, and never to attempt any division by lines run from the shore, from such parts of the lake as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would by his extent of shore line obtain a share beyond the center: but it seems *impossible*, if the whole water is to be regarded as divided up, to reach a division *without some proceeding in the nature of a partition*, which would fix the various possessions.'

Thus establishing the rule of apportionment by *convergent lines, to a common equitable center, from the extremity of adjacent ownership*, as we have described the division of the lake in the bill of complaint, and as appears on the map Exhibit A attached to the bill of complaint; and

as also appears on map Exhibit F of the evidence. This mode of division *apportions the lake into segments*, practically in proportion to the length of the adjacent frontage owned by each property owner. There can be no question that such division would be absolutely accurate, if the inland lake was exactly round; but, as suggested by Justice Campbell, the shore is usually irregular in form. Therefore, a division can only be arrived at in a manner most reasonable by *equitable apportionment* under the direction of the court.

Now, as to this case: Lake Angeline is about as broad as long, were it not for its *arms* lying east, west and south. If we were to cut off these arms, dividing the balance into segments, as above suggested, and apportion the arms separate by the 'river rule,' by a line drawn from the main body of the lake through the center of each arm, thus apportioning the arms separately, to the abutting owners and the main body by segments, adjacent to the holdings of the owners upon the main body of the lake, we would undoubtedly come to the *most equitable* mode of division possible. This is too near a mathematical demonstration for dispute.

This mode of division, under certain limitations, which we will afterwards consider, was referred to in Clute vs. Fisher, 65 Mich., page 52, in the following language: 'But in case of a body of water so large that the lines of the sections or subdivisions of sections, held by the proprietors of the lands adjoining or surrounding said lake, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the *center* line of said lake, in accordance with the rule laid down by Justice Campbell in Lincoln vs. Davis, 53 Mich., 390.'

Clute vs. Fisher has been overruled in many important respects by Ice & Coal Co. vs. Ice & Coal Co., 102 Mich., but *not as to this rule*, quoted from 53 Mich., 389: a rule of partition laid down by this court in the language of Justice Campbell. This rule has not been criticised by this court. But this rule as to partition, as laid down in 53 Mich. 389, was expressly affirmed in Ice & Coal Co. vs. Ice & Coal Co., 102 Mich., 236, 237, in the following language:

'The shore proprietor takes by virtue of shore ownership. His interest in the bed of the stream he acquires *as appurtenant to the grant*, and the extent of that interest depends upon his frontage and the form, length and breadth of the body of water upon which he abuts. That a lake may be of such form as to render the designation of the boundaries of the several riparian owners somewhat difficult, *is not an objection to the application of the rule.*' Mr. Justice Campbell says, in Lincoln vs. Davis, 53 Mich., 390: 'In carrying out lines of ownership in narrow streams, it is easy to find the general course of the stream, and to draw lines perpendicular to that course from the terminal shore lines; but on lakes all lines from the shore tend *to converge in some central part of the lake;* and while irregularity of shape prevents drawing them to a common center, they must all, if protracted, cross each other in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area in proportion to the shore frontage, and never to attempt any division by lines run from the shore, except over such parts of the lake as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would by his extent of shore line, obtain a share beyond the center. But it seems

impossible, if the whole water is to be regarded as divided up, to reach a division without some proceeding in the nature of a partition, which will fix the various possessions."

And again in Jones vs. Lee, 77 Mich., 40, Justice Campbell used the following language: "It appears clearly enough in the present case, that while there is a considerable frontage facing northwest or southeast, the lake being longest in that direction, there must also be large end frontages, which look up or down the lake perpendicularly, or nearly so, to any line across from bank to bank, at most places along the shore. If this body of water were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it is evident that it *could not be done* by reference to any *filum aquae*, or *middle thread*, but *must be done* by some rule of proportion which probably could *only* be got up by some *partition proceeding*, inasmuch as such waters are common for all ordinary purposes."

This quotation from 77 Mich. is cited with approval in Ice & Coal Co. vs. Ice & Coal Co., 102 Mich., 237.

And in the case of Hardin vs. Jordan, 140 U. S., 402, the United States Supreme Court used the following language: "If there should arise any dispute between the plaintiff and other riparian owners of land situate on the *margin of the lake, as to the convergence of the side lines*, of the plaintiff's land in the lake, it can be disposed of by the parties themselves, *by a resort to equity*, or to such other form of procedure, as may be proper."

Thus it has been held by this court, that there could be no proper division of an inland lake, similar to the one in question in this case by undertaking to divide it *filum aquae*, or at

> the *middle or thread of the stream*, according to the river rule. But that it should be by *convergent lines to a common equitable center, equitably determined* in a court of equity, as closely as it is possible to be done under the circumstances, but which can never be done to absolute accuracy. But whatever may be the rule adopted for partitioning such inland lake, there can be no question that the actual title to the submerged territory under the lake belongs to the abutting owners to the center of the lake or stream, to be apportioned in some equitable form between them, and that such title became *vested in the purchaser of the abutting lots, under the laws of the state*, which conferred upon such abutting owner the submerged territory, as appurtenant to his shore ownership."

(The italics above given are Mr. Clark's, copied from his original brief.)

In reply to this argument of complainant, defendant, The Cleveland Iron Mining Company, in one of its briefs filed in the state court, argued as follows:

"Complainant contends for the doctrine of riparian rights and argues that when the body of water is circular the center is a point to which all lines converge from the shore line. It admits that the three arms of Lake Angeline might be cut off and could be treated as streams, leaving only the central body to be differently divided. If a stream has a center line and a circular body a point to which the lines are to be drawn, it would seem to necessarily follow that every body of water which is neither a stream nor a circle must have a thread proportioned, in some way, between the length and breadth of the body; that is, that *point* must take on length and become a line when the body of water takes on length, until, as in the case of a stream, the

line extends the whole length. How long should this line be when the length of the lake is twice its width? It will not do to draw the line the entire length as in the case of a stream, as that would deprive the shore owner on either end of his fair proportion, for the lake having width the end owner has rights.

Jones vs. Lee, 77 Mich., 35.

Nevertheless, complainant's bill is filed on the theory that no surveyor can set off to it its land in severalty. We agree with complainant it cannot be done. Suppose we decide to cut off the three arms of the lake and divide them as streams. At what point will you cut them off? After that is determined how are you going to divide the balance, which i irregular in shape, not round? How much will you allow in this central body for shore frontages, and in computing shore frontages will you adopt the line where the arms were cut off or will you take the extent of the shore line of the whole lake, including the shore line of the arms cut off? By examining a map of the lake it is apparent that nearly every foot of each arm is opposite some portion of the central part of the lake, and is, on riparian principles, entitled to recognition. On the trial below complainant computed the surface of the entire lake and then divided the area proportionately to the shore frontage and proceeded generously to lay out, by lines drawn to a common center, such a part of the lake as would give to complainant the rich ore in the south deposit. This division of the lake, while giving an equal area in the water surface, perhaps, ignored the divisibility of the arms on riparian principles, and, furthermore, absolutely cut off at least two extensive portions of the lake from all access to the water.

These remarks are simply intended to show that even if complainant ever owned anything north of the section line, its boundary was a matter of great uncertainty."

It thus appears that the contention of the complainant in the state court and the complainant's whole theory of the case was that by virtue of its riparian right it was entitled to have its boundaries in the bed of Lake Angeline defined and the land thereof divided among the owners upon some basis of partition. Complainant attached a map to its bill which it suggested as one method of partitioning the lake, but admitted it was wrong at least so far as the three arms of the lake were concerned. The complainant therefore admitted that just what land it owned, if anything, in the bed of the lake, was a matter of great uncertainty. It could not, through a surveyor, lay it off by metes and bounds; it could only be determined by some equitable method of partition unless the parties could themselves agree upon it. As Mr. Clark stated in the above quotation from his brief, this partition "should be by convergent lines to a common, equitable center, equitably determined in a court of equity as closely as it is possible to be done under the circumstances, but which can never be done to absolute accuracy."

The Supreme Court of Michigan in our law record p. 257 said, "No fixed rule has been or ever can be laid down for the division of the territory covered by these inland lakes with their irregular shores, each case must depend upon its own peculiar circumstances and facts and as reasonable a division arrived at as possible."

It was apparent that complainant owned no land north of the south line of section 10 which could be

set off to it by metes and bounds by a surveyor. If so, complainant would have brought an ejectment suit. Complainant admitted that it needed the aid of a court of equity to determine its boundaries, in fact the whole purpose and object of its suit was to determine its boundaries in the former bed of the lake, and for that reason complainant cited the cases and made the argument above quoted in support of its position that its action was one in equity to settle uncertain boundaries and not at law to recover possession of any certain defined lands.

The Cleveland Iron Mining Company had always made claim to all the land north of the south line of section 10 by virtue of the language of its patents. From the evidence introduced by complainant it would appear that at one time this ownership was denied by complainant. Later, and as early as 1886, it seems to have been tacitly conceded. After Clute vs. Fisher was decided it was not thereafter questioned until the bringing of this suit. It was because of the above issues and the above arguments pro and con that Judge Grant, in giving the opinion for the Supreme Court of Michigan used the language complained of by complainant in this court, and which is claimed by the complainant to have been an adverse decision upon the construction of the patents. The actual language used by Judge Grant is to be found on printed record, page 262. It is as follows:

> "Complainant, however, invokes the doctrine that title to land cannot rest on estoppel on account of the statute of frauds, and that a vote of three-fifths of the entire stock of the company is essential under the statute to convey title. The obvious reply to the first proposition is that it is also established that the statute of

fraud does not apply to boundary lines, and that the doctrine of estoppel will be applied to the voluntary adjustment of disputed boundaries.

Hayes vs. Livingston, 34 Mich., 384–380.

Under the theory of complainant corporations could not settle boundary lines without a meeting of the stockholders called to pass upon the alienation of its lands, and the doctrine of estoppel could never be applied to a boundary line between corporations or between a corporation and an individual.

So, too, in reply to the second proposition it may be said that the statute does not apply to the voluntary adjustment of these lines, but to alienation by deed of conveyance. Complainant was not alienating, dividing or selling any of its real estate within the language of the statute.

How. St., sec. 4052.

Alienation means in law a transfer of title by conveyance.

Webster.

The Century Dictionary and Cyclopedia.

"The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders.

The contract was the act of the three parties to it. It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well the defendants, paid out large sums of money

under it. All are now estopped to deny its due execution and validity."

It is therefore apparent that the construction that complainant's counsel is here trying to place on the opinion of the Supreme Court of Michigan is a forced and unnatural one. The complainant was in the State Court contending for the very thing that the court stated, to-wit: That it owned no specific piece of land north of the section line which could be measured by metes and bounds, but it wanted the court to determine the extent of its lands and fix the boundaries. The court clearly assumed that the case as it originally stood was a case for the settlement of boundaries, but it held that the parties had themselves settled them by what had taken place.

In support of what we have here stated as to the evident views of the Supreme Court of Michigan on the ripairan rights of the parties originally in the bed of this lake, we wish to call the court's attention to certain parts of the opinion.

On page 256 the court say:

> "The difficulty in apportioning territory according to the theory of complainant is apparent from its irregular form. It seems conceded by the learned counsel for the complainant that the division according to the diagram, made a part of this bill, cannot be sustained, because they concede that it may be more equitable to divide the two arms of the lake according to the river rule, viz.: the medium *filum aquae*.
>
> It must also be conceded that the Cleveland Iron Mining Company under this rule would be entitled to some of the territory lying under the southeast arm of the lake south of the section line."

Again on page 257:

"No fixed rule has been or ever can be laid down for the division of the territory covered by these inland lakes with their irregular shores. Each case must depend upon its own peculiar circumstances and facts and as reasonable a division arrived at as possible."

Again on the same page:

"The above statement (referring to the statement of Mr. Bradt, the engineer who had located the so-called 'equitable' center under the direction of Mr. Clark, complainant's counsel.) is sufficient to show the difficulty in making an equitable apportionment, and while nothing was said during the negotiations leading up to the agreement, (the pumping contract), or in the agreement itself, in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood. It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt. Complainant had discovered a mine on its territory south of the line and extending under an arm of the lake. At that time it was the only one which it was known would be benefited by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine whether there existed under the bed of the lake ore worth mining. The contract, if valid, established the line beyond dispute. The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this

contract, recognized as valid and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of Clute vs. Fisher, 65 Mich., 48, as establishing the rule that the territory should be divided by the government lines."

Then again on page 259:

"We will first discuss and dispose of the question raised upon the theory that complainant relied upon the decision of Clute vs Fisher as an authoritative enunciation of the law in its negotiations and contract with the defendants, and that all the parties so understood it. The following, then, is the situation: We find that the parties in reliance upon that case entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each. Complainant made the contract with knowledge that it gained territory south of the line, known to be valuable, while it surrendered territory north of the line, not then known to possess any value. * * *

The anticipated result came. The explorations, expenditures and improvements were made, each company making them at its own risk. It is impossible to restore the *status quo* or to render exact justice between the parties because the data are not in existence. It is doubtful if a result approximately correct could be reached upon an accounting. It would be impossible to determine its correctness within many thousands of dollars."

Then again on page 261:

"This case is stripped of all other circumstances. It contains no element of misrepresentation, imposition, suppression, undue influence, undue confidence, imbecility or surprise. Neither said or did anything to mislead the

other. Each acted with deliberation and with complete knowledge of all the facts. The sole basis of complainant's claim is that the decision of this court, upon the faith of which the contract was made, was subsequently overruled. * *

We are, therefore, of the opinion that this case does not come within any exception to the rule that a mistake of law does not furnish any ground for relief.

Do the contract, settling the boundary line, and acquiescence therein and the acts done thereunder estop complainant now to assert a different line? The rule is settled by the decisions of this court that where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and parties have, for any considerable time, recognized them, they will be upheld though title by adverse possession could not be maintained.

Joyce vs. Williams, 26 Mich., 33.

Smith vs. Hamilton, 20 Mich., 433.

Jones vs. Pashby, 67 Mich., 459.

According to the testimony on the part of plaintiff, there was a dispute as to the boundary line. Mr. Kidder testified that the superintendent of the C. I. M. Co. asked him for a deed of the land lying north of the section line, but that he, for his company, declined to give it, making the same claim that he now asserts. If his testimony be true, and for this purpose the company must stand by its own testimony, there was a dispute and it was settled by the agreement."

Then again on page 262:

"The contract was the act of the three parties to it. It was induced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of

the corporation. Complainant as well as the defendants paid out large sums of money under it. All are now estopped to deny its due execution and validity.

* * * * * * * * *

"Complainant is entirely without equity. It doubted the correctness of the rule of Clute vs. Fisher, and thought that a different rule might sometime prevail. It was then its duty to take steps to test the question before permitting the defendants to enter into a contract and explorations involving over $100,000. It should at least have informed the defendants of its claim and given them the opportunity of making a contract with that in view. This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact that the venture proved successful after a large expenditure creates no equity for this complainant. The skill, energy and money of that company developed a valuable property. It ought in justice to reap the benefit and the complainant ought to be estopped to participate in the benefit unless an unbending rule of law prevents.

Twin Lake Oil Co. vs. Marbury, 91 U. S., 587.

Clegg vs. Edmondson, 6 DeG. M. & G., 787.

It would not have offered to bear its share of the loss if unsuccessful, nor could it have been compelled to.

Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Every one is presumed to know the law. Therefore, it must be presumed to have known of the laws enunciated in Ice & Coal Co. vs. Ice & Coal Co. It had an able attorney who keeps well versed in the decisions of the courts of this state. Yet it waited two years and a half before asserting its claim and still nine months after

obtaining the opinion of its attorney that Clute vs. Fisher was no longer the law it waited until circumstances and conditions have so changed that it is impossible to restore the *status quo.*"

In the light of the above quotations can anybody seriously contend that the Supreme Court of Michigan decided this case on a construction of the patents adverse to complainant? It is hardly conceivable that counsel, as able as the counsel that appears for complainant in this case, is serious in contending for the above proposition.

The issues raised in the answers of the defendants in their pleadings in this case were very succinctly stated by Judge Grant in his opinion. Record page 255. Omitting part of them, Judge Grant states the claim of The Cleveland Iron Mining Company thus:

> "3. Because the south section line of ten was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.
>
> 4. Because the pumping contract is an estoppel by deed against the complainant from now asserting title.
>
> 5. Because the complainant is estopped by matter *in pais* from asserting title to the land.
>
> 6. Because the complainant is estopped by its laches.
>
> 7. Because, as a tenant of a portion of the premises in dispute, complainant is estopped to deny defendant's title."

These are the issues, in addition to the claim made by the Cleveland Iron Mining Company, that it derived ownership of all land above the section line under the terms of its

patent, which were tried in the state court. As above stated, this one issue of construction of Cleveland company's patent was decided in favor of complainant.

Complainant now argues that the Supreme Court having erroneously found that the complainant owned no specific piece of land north of the section line proceeded erroneously, basing its decision on the first erroneous finding, to decide,

1. That complainant's rights north of the section line might be divested by a contract executed without the requisite three-fifths vote of stockholders, and, consequently, that the Supreme Court held the pumping contract sufficient for such purpose and would not have so held but for the previous erroneous finding of no specific land north of the section line.

2. Also, that the holding of the Supreme Court of Michigan was equally wrong in its views on the doctrine of estoppel, they being also based on the erroneous finding above mentioned.

It is a little difficult to grasp just what complainant intends to argue, but that seems to be its contention.

There are several answers to this.

1. The court was stating complainant's theory of riparian ownership in this lake and not deciding the question when it made use of the language complained of. The court did not deny complainant's original ownership north of the section line of land of uncertain boundary, but, on the contrary, as heretofore stated, assumed and conceded that proposition throughout the opinion. The whole case, as prosecuted by the complainant, was based upon the theory that it owned no specific land but rather had an interest in the bed of

the lake of uncertain extent and uncertain boundaries which it desired the court to define and set off to it. If the theory was wrong that is complainant's fault. The court was stating complainant's theory as made in the pleadings and deciding the case as made by the proof and briefs and arguments made by the complainant.

2. The purpose of this suit, as distinctly stated, was to define boundaries, and the Supreme Court of Michigan held that the statute of Michigan requiring a three-fifths vote of stockholders did not apply to a settlement of disputed boundaries. This court will not interfere with the construction placed by the Supreme Court of Michigan on a statute of that state.

3. The pumping contract itself was valid to convey title. It was executed with all the formalities of a deed, duly attested, acknowledged and recorded. The acknowledgment taken of complainant's officers specifically stated that they "executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto." (record, page 94.) This instrument, as thus acknowledged, was offered by complainant on the trial of the case as the valid contract of complainant. Whatever objections might be interposed to its authenticity and validity, as the act of the complainant corporation, if the instrument had been tendered by the defendants, vanished when the complainant itself offered the contract in evidence. Every presumption in favor of its validity as against the complainant must now be indulged. If a stockholders' meeting and a three-fifths vote were requisite to make the contract valid for all purposes, it will be presumed that they were had. In other words, complainant having offered this instrument in evidence under the

issues made in this case cannot be heard to deny its legal sufficiency for all purposes covered thereby.

The state court declined to hold with complainant that the contract was simply a "pumping contract." They say (p. 258) "The contract if valid established the line beyond dispute," and further on p. 259: "We find that the parties * * * entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each," and again "The contract * * was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. * * * All are now estopped to deny its due execution and validity."

The justice or the injustice of the decision of the Supreme Court of Michigan is not here for review on motion to dismiss. This court is without jurisdiction unless a federal question was decided adversely to the complainant. The case was disposed of and defendants' right to relief denied for various reasons mentioned in the opinion.

1st. There was a boundary settlement by the parties themselves (quotation from opinion of Supreme Court, page 257), "that contract was a deliberate settlement of the boundary line between the lands of the three companies and was so understood."

2nd. The complainant was estopped from claiming anything north of the section line. (Quotation from opinion of Supreme Court, page 258).

> "The contract if valid established the line beyond dispute."
>
> (Page 259). "It is impossible to restore the *status quo* or to render exact justice between the parties because the data are not in existence."

(Page 261). "Do the contract, settling the boundary line and acquiescence therein and the acts done thereunder estop complainant to now assert a different line?"

(Page 262). "The contract was the act of the three parties to it. It was introduced by complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant as well as defendants paid out large sums of money under it. *All are now estopped to deny its due execution and validity.*"

3rd. Complainant is without equity. (See opinion of court, page 263).

(Quotation from opinion). "Complainant is entirely without equity. * * * * This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. * * * * It was guilty of laches in keeping silence when it ought to have spoken. It waited until circumstances and conditions had so changed that it is impossible to restore the *status quo.*"

2. CONSTRUCTION OF THE PATENTS. EVEN IF CONSTRUED ADVERSELY TO COMPLAINANT WOULD NOT CREATE A FEDERAL QUESTION.

The only question of construction to be raised and decided in relation to the land patents was the extent of territory comprised in each. The extent and nature of such ownership is a matter of policy for the states themselves to determine and one in which the general government is not concerned.

Hardin vs. Jordan, 140 U. S., 402.
Barney vs. Keokuk, 94 U. S., 324.
St. Louis vs. Ritz, 130 U. S., 226.

3. IF THE CONSTRUCTION OF THE PATENTS WAS A FEDERAL QUESTION AND DECIDED ADVERSELY TO THE COMPLAINANT, COMPLAINANT DID NOT RAISE THE MATTER PROPERLY IN THE STATE COURT, WHICH IT IS ATTEMPTING TO HAVE CONSIDERED HERE.

In order to raise a federal question such question must be specially set up and the right claimed thereunder in the state court.

Hoyt vs. Thompson, 66 U. S., 518.
Texas & Pac. Ry. Co. vs. South. Pac. Ry. Co., 137 U. S., 48.
Leeper vs. Texas, 139 U. S., 462.
Mo. Pac. Ry. vs. Fitzgerald, 160 U. S., 556, 575.
Seward vs. Denny, 158 U. S., 180, 183.

This case was brought and argued in the state court on the theory that the complainant had some interest in the land which was formerly the bed of Lake Angeline, of uncertain extent and boundaries, and that it needed the aid of a court of equity to define such boundaries. The Supreme Court of the state so regarded complainant's case as there made. The complainant did not there urge that it owned any specific piece of land north of the south line of section 10. True, in its bill it claimed a certain triangular piece, but the prayer of the bill was for general equitable relief, and on the argument complainant admitted that the division set out in the bill could not be made, that the arms of the lake at least were susceptible of division by the 'river rule' and the central lake body proper by a rule of proportion. If the bill made claim to any specific piece of land north of the section line complainant abandoned this

claim on the trial of the case and urged simply the right to a definition of uncertain boundaries in some equitable manner. The court was stating complainant's theory not deciding the question when it said, "Complainant owned no specific piece of land north of the section line, even under its own theory which could be measured by metes and bounds. How much if any it owned could only be determined by agreement or the decree of a court of equity."

Even if the court had actually decided the question, the court would have been warranted in so deciding it because that was the very contention that complainant was making, and it would not lie in complainant's mouth to now complain of a proposition decided by the state court in complainant's favor and according to its contention there made. Therefore, if the state court did decide that complainant owned no specific piece of ground north of the south line of section 10, such decision was in harmony with the claim there made by complainant, and if such decision was wrong the complainant could not now object as it was raised here for the first time.

ARGUMENT ON THE MERITS.

I

THE COMPLAINANT COMPANY IS ESTOPPED FROM CLAIMING ANY TERRITORY NORTH OF THE SOUTH LINE OF SECTION TEN.

1. THE FACT THAT THE COMPLAINANT RECOGNIZED THE SECTION LINE AND AGREED TO REGARD IT AS ITS NORTH BOUNDARY BECAUSE OF THE DECISION OF THE COURT IN CLUTE vs. FISHER, DOES NOT MAKE SUCH A MISTAKE AS WILL WARRANT A COURT IN GRANTING THE RELIEF PRAYED FOR IN THE BILL OF COMPLAINT.

Granting that all the complainant did, it did because of its knowledge of Clute vs. Fisher, that will not prevent an estoppel against it.

> "A court of equity will not relieve a party from a contract entered into by mistake, where the mistake is one purely of law and unattended with misrepresentations, undue influence, misplaced confidence or other special circumstances of similar character.
>
> Thus a contract entered into by parties under a mutual supposition that the law affecting the subject of the contract was in accordance with a previous decision of the Supreme Court upon a similar state of facts, will not be set aside because of a subsequent decision by the same court, overruling the former one and declaring a different rule upon the subject."
>
> Syllabus, Kenyon vs. Welty, 20 Cal., 637.

"A subsequent decision of the court of errors in a different case, giving a different exposition of a point of law from the one declared by the Supreme Court, when the parties to a suit entered into an agreement relative to such suit, can have no retrospective effect so as to destroy the operation of such agreement.

The court does not relieve parties from their acts and deeds fairly done on a full knowledge of the facts though under a mistake of the law. Every person is charged, at his peril, with a knowledge of the law."

Lyon vs. Richmond, 2 Johnson's Chancery, p. 51.

In this latter case on p. 60, Chancellor Kent said :

"Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to most mischievous consequences."

The parties, since the pumping contract, have materially changed their position with respect to their properties and on the faith of the boundaries agreed upon and recognized in the pumping contract have expended hundreds of thousands of dollars in development work. They have made improvements of a lasting character. Granting, if you please, that Clute vs. Fisher was responsible for all that the parties did, an attempt now to upset everything because Clute vs. Fisher has been overturned would be very mischievous in its consequences to all parties to this suit, as will elsewhere clearly appear.

2. WITHOUT RESTORATION COMPLAINANT CANNOT RECOVER ANY PROPERTY NORTH OF THE SECTION LINE, EVEN IF ORIGINALLY SUCH PROPERTY BELONGED TO IT AND IT GAVE UP SUCH PROPERTY UNDER A MISTAKE OF FACT. RESTORATION IS IMPOSSIBLE. THEREFORE, COMPLAINANT CANNOT RECOVER.

Ordinarily acts done and contracts entered into by parties through a mutual mistake of fact will be relieved against if, before the condition of the parties has materially changed, either, promptly on the discovery of the mistake, offers complete restoration. It is however elementary that equity will not interfere to relieve a party from the consequences of such mistake unless restoration is possible. If the parties' rights in the bed of Lake Angeline are to be determined by shore frontage, the complainant company has mined out a large quantity of ore south of the section line which belonged to defendant, Cleveland Iron Mining Company, and has destroyed the mine from which it was taken and has no adequate means even of determining what amount was taken from that land. No definite explanation was attempted or offered by complainant below as to the amount of ore thus taken. On the contrary complainant claimed that *it owned this ore and never offered to make any restoration.*

The pumping contract offers an insuperable obstacle to restoration. If the court should find that originally complainant owned some land north of the section line, what is to be done with this pumping contract? As has been heretofore shown and as very clearly appears in the record, the expense to be borne by the parties to the pumping contract and the manner

in which the lake was to be permanently drained were fixed and settled on the theory that the complainant owned nothing north of the section line. If, therefore, some land north of the section line were to be given to complainant, it would necessarily follow that not only some additional part of the expense heretofore incurred in pumping out and keeping the lake bed dry, but also some part of the expense of continuous pumping thereafter, should be borne by complainant company; that is, the alleged mutual mistake which fixed upon the section line as the boundary prevaded and is responsible for the apportionment of the expenses incurred under the pumping contract. If it were equitable to readjust the boundaries, it would be inequitable to let the pumping contract stand.

When a court proceeds to interfere with a written contract it must proceed upon certain well recognized lines. It may reform the contract or rescind it. It can, however, reform it only when by some mistake or inadvertence the agreement of the parties was incorrectly set out. There is, however, no claim here that the contract was not written just as the parties intended it should be. There is no legal warrant for the court to change this pumping contract and prescribe new terms on some new theory that to the court would seem equitable, for that would substitute the court's contract of the parties and obligate them to an instrument to which they never gave their assent. A court may rescind a contract if it were procured by fraud or duress or if made under a mutual mistake, provided the court can place the parties *in statu quo*. No fraud or duress or other undue influence is claimed in this case. It, therefore, follows that the contract must either stand as it is or be rescinded

in toto, by reason of an alleged mutual mistake. The contract, as has been heretofore shown, cannot be permitted to stand if the boundaries are to be readjusted, and the alternative is then a cancellation of the contract. Not only is the bill not filed to procure a cancellation of this contract, but the contract can not be cancelled without doing irreparable injury to each of the parties. If the boundaries were readjusted and the contract cancelled, it would have to be done on the theory that the parties had riparian rights in this lake bed. With the contract out of the way it would be the right of any riparian owner to insist that the lake should remain in its original condition. Not only could any one of the parties refuse to join in the expense of keeping the lake bed dry, but each could also positively prohibit any of the others from keeping it dry. An injunction would lie to prevent the pumping out of the water at the instance of any riparian owner.

The Cleveland Company in reliance upon this contract and the fact that it provided for permanently keeping the lake bed dry, has caved in its north mine and made a direct entry into it from the lake bed. The refilling of the lake would destroy this property. It is unlikely that any of the three parties in any of their mining operations conducted under the bed of the lake have had in mind the possibility of the lake again filling with water. Mining under a bed of water is, at the best, a dangerous and expensive proceeding and it is probable that the refilling of the lake would destroy all of the mines in the bed of the lake. In dealing with this question of restoration and the consequences following a cancellation of the pumping contract, this court cannot consider the possibility or the

probability of self-protection or self-interest forcing these parties again into some pumping arrangement. In order for the court to act at all the court must, by its decree, prevent the irreparable injury. An irreparable injury follows as a legal consequence of the fact that any one of the parties can cause that injury. This irreparable injury forbids action on the part of the court.

We, therefore, say unhesitatingly that the pumping contract prevents an insurmountable obstacle to granting the complainant relief. To summarize this branch of the case we say:

(a) The pumping contract cannot stand if the boundaries are interfered with, because the very inducement and consideration thereof would then fail.

(b) The pumping contract cannot be reformed or changed by the court, as there exists no basis for the one, and the other substitutes the court's contract for the contract made by the parties.

(c) The contract cannot be cancelled without irreparable injury.

(d) The bill is not filed to obtain a cancellation of the contract and no offer is made to have it changed or cancelled.

The pumping contract, therefore, prevents restoration, and without restoration the bill must be dismissed.

3. COMPLAINANT DOES NOT OFFER TO MAKE RESTORATION.

It is probably idle to discuss in a court of equity the possibilities of restoration, when the complainant instead of being eager and willing and anxious, does not even offer restoration, but, on the contrary, is

unwilling that it should be made. Nowhere in the bill filed was there any suggestion of restoration, and in the argument the only thing suggested is the claim, broadly made, that the profits made in taking out the ore equal the expenditures in the mine. There was no offer in the state court anywhere to rescind, change or modify the pumping contract. Here complainant suggests that the court reapportion the expense by the territory awarded complainant. While an offer of restoration would, perhaps, not help the situation because of its impossibility, still it would have been some evidence of good faith on the part of the complainant—some proof of complainant's disposition to do equity. The complainant insists on the pumping contract; insists on keeping the ore mined from the triangle south of the section line and every other advantage accruing to it by reason of the alleged mistake in the boundary and by reason of the hazardous explorations and mining operations carried on for the last five years.

The defendants not seeking any affirmative relief, the jurisdiction of the court granting relief is limited by the case made by the complainant, and the complainant nowhere offers to submit the question of a change in the pumping contract to the court. The court, therefore, is without power or jurisdiction to interfere with this pumping contract and, consequently without power or jurisdiction to do complete justice.

When a court of equity is called upon to correct a mutual mistake it must place the parties where they were before the mistake was made. Not only is the court powerless to do it in this case, but the complainant has not even offered to permit it to be done.

4. THE LACHES OF COMPLAINANT ESTOPS IT FROM DISPUTING THE BOUNDARY.

According to the case made by complainant, from February to November, 1896, it was fully advised of all its rights. During this interval it stood by while the defendant, by its mining operations, converted what was a mere hope or opinion into an absolute certainty. (Record pages 206 to 207). This same summer the defendant repeatedly recognized the boundary line dividing the two properties:—among other things, took a lease of a part of the very property which it now claims to own. (Record pages 207 to 211). If the defendant's mining operations had suddenly been cut off by a ledge of rock, such as is encountered frequently in all kinds of mines, disappointing the most sanguine expectations, defendant would never have heard of complainant's claim. The complainant would have been entirely content to retain the ore which it had mined in the triangle south of the section line. Having learned, however, of the reversal of Clute vs. Fisher, and having discovered some months later that defendant's operations had disclosed a valuable deposit of Bessemer ore, complainant concluded to try to recover this property. Is not complainant's claim stale? A recovery by it would be a gross wrong and a fraud upon the defendant company.

Twin Lake Oil Co. vs. Marbury, 91 U. S., 587.

Clegg vs. Edmondson, 8 DeG. M. & G., 787.

5. THE FACT THAT THE COMPLAINANT COMPANY AT THE TIME IT AGREED TO THE SECTION LINE AS THE BOUNDARY LINE ACTED HONESTLY AND NOT FRAUDULENTLY DOES NOT PREVENT AN ESTOPPEL.

For the authorities and argument upon this subject we respectfully refer the court to the opinion of Judge Stone (other printed brief, pages 92 to 96); also to other brief pages 78 to 81.

> Herman on estoppel, vol. 2, Secs. 730, 731, 733, 735, 736, 759, 762, 754 and 772 to 776 inclusive.
>
> Tiffany vs. Anderson, 55 Ia., 405.
>
> Stewart vs. Mix, Sheriff, 30 La. Ann., p. 1040.

The cases cited by Herman in the above sections, as well as the text, expressly recognize the doctrine that extensive improvements made in the belief of an existing boundary will prevent restoration. The mine structure created by the defendant comes within the designation of an "extensive improvement," nearly half of it being in rock and built for the purpose of future mining operations.

While complainant's conduct prior to the discovery of the decision in Ice Co. vs. Ice Co., can be reconciled with good faith, its conduct from February to November, 1896, should be characterized as fraudulent, provided it insists upon its right now to recover this property. The interval was consumed by the Cleveland Company in large expenditures and in addition to the laches involved (which is elsewhere treated) the conduct of complainant during that interval will not commend itself to the court.

II.

THERE WAS A BOUNDARY SETTLEMENT BETWEEN THE PARTIES.

That it is competent for parties to settle an uncertain and disputed boundary even by parol is clearly established. The complainant attempts to gainsay a boundary settlement claiming that there was never any dispute over the boundary—that there was never any uncertain boundary to settle. There is no proof that the Cleveland Iron Mining Company ever heard of Clute vs. Fisher, but, on the contrary, that it made claim to all land north of the section line by reason of the description contained in its patents. It is also clear that Mr. Kidder, the agent of the complainant, did not regard Clute vs. Fisher as necessarily final and conclusive (see record, pages 101 to 102), and neither of the defendants said or did anything by reason of Clute vs. Fisher. Is complainant's case different, it it having relied, if you please, on the opinion of the Supreme Court, than it would be if it had relied on the erroneous opinion of the law given it by some attorney? The decisions of a court are sometimes spoken of as rules of property, and the federal courts usually recognize the state decisions as decisive on local matters: that is, they will apply the same law that the state court would apply, and they, therefore, recognize the state decisions as controlling. The decisions of courts, however, only declare the law and there is no reason to think that the federal court would have followed Clute vs. Fisher (the federal court refused in Hardin vs. Jordan, 140 U. S., 371, to follow 120 Illinois, 509, because in their opinion that decision was opposed to prior decisions in Illinois), and the

lower court in Michigan in Ice Co. vs. Ice Co., rejected Clute vs. Fisher. It was likewise open to the Lake Angeline Company to disregard or contest it.

Complainant seems to argue that Clute vs. Fisher was a rule of property. If that be so it would follow that rights acquired before it was reversed could not now be divested.

If it is not a rule of property, and complainant is hardly serious in thus contending, it is only an opinion, a bar only in the suit where rendered, controlling in other cases, even in the same state, only by force of its reason and logic. If well founded it will be followed; if not, it will not be followed.

Granting, if you please, that the Cleveland Iron Mining Company's claim to own all of the land north of the south line of section 10 under its patent was unfounded, if the complainant acquiesced therein it would constitute a settlement; and the fact that complainant was prompted to acquiesce because of the erroneous legal opinion of its attorney, reinforced by erroneous dicta of several other attorneys, who happened at that time to constitute the Supreme Court, uncommunicated to the defendant, the Cleveland Iron Mining Company, would not make a mutual mistake. Every law suit, honestly undertaken, has one mistaken litigant acting under wrong advice. Just which one is the mistaken party is often not determined until it reaches the court of last resort. Nearly every private settlement reduces, in amount, some valid claim by an offset of some unfounded claim honestly or dishonestly urged. Claims with little or no foundation are sometimes as persistently urged, if not more so, than well-founded claims, depending a great deal upon the peculiar temperament and char-

acteristics of the complainant. The Cleveland Iron Mining Company believed that its patents gave it the land to the section line. The complainant, acting upon the advice of its own attorney, if you please, that Clute vs. Fisher gave defendant that land, acquiesced in defendant's claim and proceeding on that acquiescence no longer contested defendant's construction of its patents, but expressly in solemn documents ending in a pumping contract, to be followed by extensive explorations and mining operations, involving hundreds of thousands of dollars, expressly recognized the section line as the boundary line. The pumping contract was witnessed and acknowledged as a deed of real estate in order that it might bind the successors and assigns of the parties thereto.

Mr. Kidder says that at one time Mr. Morse requested him to exchange mutual quit claim deeds making the section line the dividing line, but he refused as he believed his company owned to some place out in the lake. (Record pages 108, 109). Mr. Walters also (Record pages 224 to 227), testified to Mr. Mills trying in 1891 to get him to sign some paper relating to the boundaries. While this evidence is not entirely satisfactory and clear, as far as it goes, it tends to show that, prior to the pumping contract, there was some controversy, or at least an uncertainty, about the boundary.

The same law that would give complainant company any land north of the section line, would give the Cleveland company some land south of the section line and, therefore, when the boundary line was finally agreed upon, complainant company was getting something as well as giving up something, so that an agreement accepting the certain line as a boundary was upon a

valuable consideration and ought in law to be as binding as quit claim deeds. Be that as it may, the Cleveland company was claiming under its patent, and the reasons or grounds for acceding to that claim were never communicated to it by complainant. There may have been some question in the minds of those in control of the Cleveland company as to the exact construction to be placed on its patents, growing out of the reference in the patents to the government survey. They might have been moved by this reference to desire to place the question beyond controversy by quit claim deeds. There is, however, one thing certain. Clute vs. Fisher was never made the basis of defendant, Cleveland Iron Mining Company's claim to its property north of the section line.

There is, then, no reason for claiming mutual mistake. At most there is an unfounded claim urged on one side and an acquiescence in such unfounded claim by the other party on the strength of wrong legal advice of this other party's solicitor, which was never communicated to the Cleveland company. For some reason, at some time, the parties agreed to regard the section line as the boundary and at that time the land south of the section line which would have belonged to the Cleveland Iron Mining Company, by reason of its riparian rights in the lake, was undoubtedly apparently worth more than all the land immediately north of the section line. The parties from thenceforth have, until the bringing of this suit, regarded the section line as settling their boundaries. It will be noticed from the record that the president of the Cleveland Iron Mining Company during all these transactions and at the time the pumping contract was made, had died before this suit and that the complain-

ant did not call its president or executive officer and disprove the inference which necessarily follows from the facts, that an agreement settling this boundary was made before the pumping contract. But we need not go even this far, because acquiescence alone "under circumstances which imply an assent which has been followed by a change in the conditions of the parties, made on the strength of such acquiescence, is sufficient."

Manistee Mfg. Co. vs. Cogswell, 103 Mich., 602.

There are other reasons for regarding this boundary as settled. We are not furnished with the opinion of Mr. Clarke on Clute vs. Fisher, but he undoubtedly in that opinion, referred to various other cases, Lincoln vs. Davis, 53 Mich., 375, etc., which he now claims fix an equitable (?) center some place out in the lake as the boundary and he claims that this equitable (?) center is so uncertain that he needs the aid of a court of equity to find it although he is willing to aid the court in finding one which will give to his company all the valuable ore. He undoubtedly advised Kidder that his boundary was certain if he chose to rest on Clute vs. Fisher, but very uncertain if it was to be determined by the rule of Lincoln vs. Davis.

The complainant contends for the doctrine of riparian rights, and argues that when the body of water is circular the center is a point to which all lines converge from the shore line. It admits that the three arms of Lake Angeline might be cut off and could be treated as streams, leaving only the central body to be differently divided. If a stream has a center line and a circular body a point to which the lines are to be drawn, it would seem to necessarily follow that every

body of water which is neither a stream nor a circle must have a thread proportioned, in some way, between the length and breadth of the body: that is, that *point* must take on length and become a line when the body of water takes on length, until as in the case of a stream, the line extends the whole length. How long should this line be when the length of the lake is twice its width? It will not do to draw the line the entire length as in the case of a stream, as that would deprive the shore owner on either end of his fair proportion, for the lake having width the end owner has rights.

Jones vs. Lee, 77 Mich., 35.

Nevertheless, complainant's bill is filed on the theory that no surveyor can set off to it its land in severalty. We agree with complainant it cannot be done. Suppose we decide to cut off the three arms of the lake and divide them as streams. At what point will you cut them off? After that is determined how are you going to divide the balance, which is irregular in shape, not round? How much will you allow in this central body for shore frontages, and in computing shore frontages will you adopt the line where the arms were cut off or will you take the extent of the shore line of the whole lake, including the shore line of the arms cut off? By examining a map of the lake it is apparent that nearly every foot of each arm is opposite some portion of the central part of the lake, and is, on riparian principles, entitled to recognition. On the trial below complainant computed the surface of the entire lake and then divided the area proportionately to the shore frontage and proceeded generously to lay out, by lines drawn to a common center, such a part of the lake as would give to complainant the rich ore in the

south deposit. This division of the lake, while giving an equal area in the water surface, perhaps, ignored the divisibility of the arms on riparian principles, and, furthermore, absolutely cut off at least two extensive portions of the lake from all access to the water.

These remarks are simply intended to show that even if complainant ever owned anything north of the section line, its boundary was a matter of great uncertainty. That it is difficult of division, as is said in Ice Co. vs. Ice Co., furnishes no reason, in a proper case, for not doing it. How much weight did this uncertain bonndary have with complainant when it accepted Clute vs. Fisher? Kidder, complainant's agent, clearly shows that he knew that Clute vs. Fisher might be reversed. In any event, whether it was riparian rights, Clute vs. Fisher, or what, when once it was decided to drain the bed of the lake and mine ore therefrom, the necessity forever of settling the question of boundaries was paramount to all other considerations. Clute vs. Fisher furnished a certain rule. Riparian rights furnished a very uncertain rule. The Cleveland Iron Mining Company was claiming a construction of its patents which gave it the same property that it would get under Clute vs. Fisher. All of these considerations unquestionably entered into the mind of the complainant company and, as has been several times before stated, from the explorations made by the complainant company in its own territory, it looked as though there might be ore in this triangle south of the section line, but they had no suspicion that the ore body extended over the section line and the probabilities were that the piece of ground that complainant company would get from the Cleveland Company by adopting the section line as the

boundary was worth more than all the land on the other side of the section line. In Hardin vs. Jordan the court did not attempt, nor in Ice Co. vs. Ice Co. does the court attempt, to lay down any rule to aid or guide adjoining riparian owners. In both cases the court pertinently suggests that such questions "can be disposed of by the parties themselves," and in our opinion the evidence is overwhelming that that is what was done in this case.

HOYT, DUSTIN & KELLEY,

Of Counsel for Cleveland Iron Mining Co.

No. 260.

By Ball v. Nemaha for Def'ts

Office Supreme Court
FILED
MAR 31 1900
JAMES H. MCKENNEY
Clerk

SUPREME COURT OF THE UNITED STATES.

Filed Mar. 31, 1900.

October Term, 1899.

PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
v.
THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY,
Defendant in Error.

No. 260.

In Error to the Supreme Court of the State of Michigan.

BRIEF IN BEHALF OF THE DEFENDANT,

THE LAKE SUPERIOR IRON COMPANY,

ON MOTION TO DISMISS AND ON HEARING.

MARQUETTE:
MINING JOURNAL CO. (LIMITED), PRINTERS.
1900.

INDEX.

Pages.

Statement of Facts 2-15

STATEMENT OF CASE AS BEARING UPON THE JURISDICTION OF THIS COURT.

The Bill 15-20
The Answers 21
The case as presented by plaintiff's counsel in the state court 20-21
Decision 21-22

ARGUMENT.

The writ of error should be dismissed for want of jurisdiction 23
The subject of controversy is the title to the bed of Lake Angeline, the land on the shore of the lake being owned by the parties in severalty 24
The claim of the plaintiff in error as presented to the state court in reference to its title to that portion of the lake bed which is the subject of controversy 26
First—The claim as stated in the bill of complaint 26
Second—The case presented by the bill relating to the boundaries of the part of the lake bed in controversy 30
Third—The case presented to the state court by the plaintiff's evidence ... 32
Fourth—The claim made by the plaintiff in error upon the hearing in the state court 35

Fifth—No Federal question was raised before the state court in such manner as to give this court jurisdiction 38

Sixth—The decision of the state court ... 42

Seventh—The Federal question presented in this court was not necessary to the determination of the case 55

Eighth—To give this court jurisdiction the claim made under the laws of the United States before the state court must be a real and not a fictitious claim 58

If a Federal question was raised and decided by the state court it was correctly decided, and the other questions are not subject to review by this court 59

The case was correctly decided by the Michigan Supreme Court, and if this court had jurisdiction to review the entire case the decree should be affirmed 61

If the parties had not already apportioned the lake bed among themselves and established their boundaries the court, if it had jurisdiction to make such apportionment could not do so by lines converging to a common center, but must make such division by lines running to the middle line or thread of the lake 89

Conclusion 107

SUPREME COURT OF THE UNITED STATES.

PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
v.
THE LAKE SUPERIOR IRON COMPANY AND THE CLEVELAND IRON MINING COMPANY.

October Term, 1899.
No. 260.

BRIEF FOR DEFENDANT THE LAKE SUPERIOR IRON COMPANY.

ON MOTION TO DISMISS WRIT OF ERROR, AND ON HEARING.

There is no statement of the case in the brief of plaintiff in error, such as is required by the rule, nor such as is necessary to inform the court, at the outset, of the nature of the controversy.

The brief of the defendant, the Cleveland Iron Mining Company, is very full and complete, except that some of the acts of the parties bearing on the question of estoppel as affecting the Lake Superior Iron Company are not stated.

Adopting, in the main, the statement of facts as set forth in the brief of our co-defendant, we offer the following as a condensed summary of the facts of the case. Our references are to the pages of the Record as printed for this court.

STATEMENT OF FACTS.

The record shows that the three parties to this case are the owners of the lots and parcels of land which form the entire frontage on Lake Angeline, as stated in the plaintiff's brief.

The said parcels of land have been owned by the respective parties and have been in their possession for many years. The amount of frontage upon the lake owned by the several parties does not appear. The plaintiff undertakes to give the frontage of each owner, by taking the length of the meander lines as the length of the shore lines, and they compute the acreage of the lake by taking the whole area within the meander lines (Record pp. 37 to 41). It is clearly shown by the evidence, however, and not disputed, that the meander lines do not even approximately correspond with the shore line, and consequently they furnish no criterion upon which to arrive at the entire length of the shore line, nor the length of the shore line of the respective parties. See testimony of George P. Cummings (Record pp. 155 to 159), and defendant's exhibit 2a, a greatly reduced copy of which appears at page 164; also testimony of James E. Jopling (Record pp. 194 to 196), and map made by Jopling, a reduced copy of which appears at page 218 of the Record (Def'ts Ex. 28).

The plaintiff claims the ownership of a portion of the bed of Lake Angeline, which has been drained, *by virtue of its riparian ownership*, marks out and defines a particular portion of said lake bed which it claims to own, and prays for a decree quieting its title to the portion of the lake bed so marked out and designated by it, and also prays the court to "*decree a designation of the territory owned by your orator and*

said defendants by lines that shall equitably locate the territory of your orator and the said defendants."

The defendants have been in possession of their respective parcels of land bordering on this lake for thirty years and upwards and no claim has ever been made by the plaintiff that it was the owner of any portion of the lake bed lying north of the south line of section ten (10), projected through the lake, until about the time of the commencement of this suit. See testimony of Mr. Hall (Record p. 147), D. H. Bacon (Record pp. 185, 187 to 189), and F. P. Mills (Record p. 194).

The plaintiff, in operating its mine, has wasted its rock into the waters of Lake Angeline and in doing so, for a time, wasted its rock into the lake north of the south line of section ten (10), opposite the property of the Lake Superior Iron Company, and put up some buildings, some of which were partly, and some wholly, north of that line, on the ground made by such waste; but this was not done under any claim of title but was tacitly permitted by the Lake Superior Iron Company, so far as the filling is concerned, because it was not considered by said company any damage to make such filling, and as for the buildings erected, no inquiry was made in regard to the line, and the Lake Superior Iron Company did not know whether they were over the line or not, but, not having any occasion to use the property, made no objection. See testimony of Mr. Hall (Record pp. 139 and 140).

No use of the bed of the lake, other than for wasting rock and the erection of the buildings mentioned, was made by either of the parties until about 1888 or 1889. The agent of the plaintiff, some time in the year 1887, learned of the decision, or dictum, of the Supreme court of Michigan in the case of *Clute v. Fisher*, to the effect that a riparian proprietor on an inland lake was

entitled to so much of the bed of the lake as would fill out the subdivision of land of which the fraction he owned formed a part. He consulted his counsel on the subject and was advised that such was the law established by that court, and that therefore the proprietorship of the plaintiff in the bed of the lake was restricted to that portion that lay within section fifteen (15).

No question had ever arisen between his company and the Lake Superior Iron Company on the subject, but without making any further investigation the plaintiff acquiesced in that view of the law, and of its own accord removed the most valuable of the buildings so that they would be entirely within the boundaries of the plaintiff's property as limited by the rule above mentioned. See testimony of Mr. Kidder (Record pp. 85 and 86).

From this time on all parties acted on the understanding that the south line of section ten (10), extended through the lake, was the boundary in the lake bed as well as on the upland, between the two defendants on the north and the plaintiff on the south.

No further occupancy or use of the lake bed lying between the Lake Superior Iron Company's property and the plaintiff was made until the time of pumping out the lake, as hereinafter mentioned. The Cleveland Iron Mining Company, however, commenced drilling holes in the bed of the lake in 1886 and discovered there a body of ore (Record p. 185-6), and in 1888 or 1889 sunk a shaft near the edge of the water upon the north side of the lake and drifted under the bed of the lake to reach that body of ore (Record p. 191).

The plaintiff in 1890 sunk a shaft on its property on the notheast quarter of section fifteen (15), by the edge of the north shore of the southeast arm of the

lake, which extends down into that section. They cross-cut from their shaft under the lake bed, where. in 1892, they opened up a body of ore, which was making northwesterly towards the section line, and drifted in both directions on this body of ore (Record p. 117).

The agent, superintendent and engineer of the plaintiff, being satisfied that the ore would probably extend northwardly across the line between sections ten (10) and fifteen (15), informed the agents of the Cleveland Iron Mining Company of that fact, and that undoubtedly the ore extended over on to the Cleveland Iron Mining Company's property (Record pp. 98, 99, 117).

At the request of the agents of the Cleveland Iron Mining Company the plaintiff allowed them to drive five diamond drill holes from one of the levels of its mine northwardly, in order to test the property lying north of the line, and they also bored five drill holes just north of the line, in order to further test the property (Record pp. 57-58, 98 99, 117.)

It having become evident that a large and valuable body of iron ore lay under the bed of the eastern portion of the lake, both north and south of the section line, and probable that ore might exist in the western part of the lake, belonging to the Lake Superior Iron Company, the parties, deeming it necessary for the successful prosecution of mining operations under the lake bed that the lake should be drained, began to negotiate with respect to joining in the expense of such drainage. The plaintiff was particularly anxious for the drainage of the lake and contemplated building a cofferdam along the section line dividing the southeast arm of the lake from the main body, so that it could take the water out of its portion of the lake and carry on mining operations there, unless it

could induce the other proprietors to join it in draining the entire lake (Record pp. 88-89, 104, 105, 106.)

The negotiations were carried on between the plaintiff and the Cleveland Iron Mining Company, and between the latter company and the Lake Superior Iron Company (Record pp. 88, 136).

In settling the question between the plaintiff on the one part and the two defendants on the other, as to the proportion of expense to be paid by each, the plaintiff insisted that its proportion should be smaller than the others, for the reason that the area of the lake belonging to it was smaller, and that it consisted only of the shallow portions of the lake (Record pp. 95, 103, 104, 105, 106, 107-108, 181, 193, 194).

It insisted that the central portion of the lake was much deeper than its part and that it had no interest in removing the water and mud from those deeper portions of the lake.

As to the expense of permanent drainage the plaintiff insisted that it ought not to pay any portion of that expense, for the reason above mentioned, except to construct a flume that would carry off the water coming into the lake bed from its property south of the section line (see Exhibit 3, p. 175).

After considerable negotiation the companies arrived at an agreement and, preparatory to carrying out that arrangement, they petitioned the common council of the city of Ishpeming, in which the lake was located, for permission to drain the lake, which petition embodied an ordinance they desired the council to pass (Record pp. 178 to 180).

This petition was signed by the agents of the three companies, in the name of the companies, and specifically defined that portion of the lake bed which each party claimed to own. It set forth that the Cleveland

Iron Mining Company owned all that portion of the lake bed situated north of the south line of section ten (10), and east of the center line of said section, extended through the lake; that the Lake Superior Iron Company owned all that portion of the bed of the lake north of said south line of section ten (10) and west of the center line; and the complainant in this cause owned all that portion of the lake bed lying south of the south line of section ten (10), projected through the lake, and also the surface right, as it was called, of the small fraction on the south side of the lake known as lot number six (6) of section (10).

It was entirely unnecessary in presenting this petition, to state the precise ownership of each of the parties, or that it be embodied in the ordinance; but the parties evidently deemed it wise and prudent to so define their respective ownerships, in order to show and place on record the claims as well as the concessions of each party as to ownership, upon which the pumping contract to be executed was based. This ordinance was passed March 16, 1892.

Upon the passage of this ordinance a contract was prepared for execution by the three companies, bearing date the 17th of March, 1892, a copy of which contract appears in the record at pages 88 to 94.

The contract recites the fact that the three parties severally own all the land abutting upon Lake Angeline, that iron ore has been discovered under the bed of the lake, and in order to economically mine the ore it is necessary that the lake be pumped out and permanently drained. It recites that a proposition has been made by the contractor to furnish apparatus for the permanent drainage and to pump out the water for a certain sum mentioned. And thereupon the said three parties respectively agree as follows:

The first party, the Cleveland Iron Mining Company, agrees to pay eight-fifteenths of the entire cost of purchasing the pump and apparatus and of pumping out the lake, amounting to $17,600.00, and eight-fifteenths of any additional cost necessarily incurred; and also an additional proportion of the pump and appliances after the water has been pumped out. The first party also agrees, after the lake is pumped out, to maintain and operate the pumping apparatus for the continuous and permanent drainage of the lake, advance all the expenses therefor, and that all the expense of such permanent drainage is to be paid by it and the Lake Superior Iron Company in the proportion of the number of tons of ore taken out each year from the lake bed by each of them respectively; and also two-thirds of the cost of any further apparatus which may be required.

The second party, the Lake Superior Iron Company, agrees to pay four-fifteenths of the cost of pump and apparatus and of pumping out the water, and the same proportion of any additional cost that may be necessarily incurred. It also agrees to pay its proportion of the permanent drainage, the same to be divided between it and the Cleveland Iron Mining Company in proportion to the number of tons of ore taken out each year from the bed of the lake, and also to pay for one-third of the cost of any additional apparatus needed for the permanent drainage of the lake.

It will be seen that these two companies bind themselves, not only to each other, but also to the Pittsburgh and Lake Angeline Iron Company, to continue the drainage of the lake, and to bear the entire expense of such continuous drainage.

The third party, the Pittsburgh and Lake Angeline Iron Company, agrees to pay three-fifteenths of the cost of pumping out the water, and three-fifteenths

of any additional cost necessarily incurred therefor, less the one-fifth of the value of the pump and appliances which is to be paid by the first party.

Instead of undertaking to bear any part of the cost of permanent drainage the third party agrees to erect and maintain a flume, so as to divert and carry away all the surface water that would otherwise come into the bed of the lake from the land lying above the water level and south of the south line of section ten (10), as projected through the lake, and also to run into that flume all the water it should pump from its mines, and to keep the same in operation "*until the iron ore to which said third party is entitled, lying on, in, or under the portion of the bed of said lake lying south of the south line of said section is mined and exhausted,*" and then to turn over the flume to the other parties and allow them to operate it at their own expense for the same purpose thereafter, it, said third party, being thereafter relieved of any portion of the expense of drainage of the lake or the maintaining of such flume,

It was further provided that the said agreement should extend to and be binding upon the successors, assigns and grantees of the respective parties.

The contract was executed by the president and secretary of each of said companies, *under their respective corporate seals.* It was executed and acknowledged by the Cleveland Iron Mining Company on the day of its date, March 17, 1892 (Record p. 93). It was executed and acknowledged by the Lake Superior Iron Company on the 6th day of July, 1892 (Record p. 94); by the president of the Pittsburgh and Lake Angeline Iron Company *on the 20th day of August, 1892* (Record p. 94) and by the secretary of said company on the *22nd day of August, 1892* (Record p. 94).

Under this contract the water was taken out of Lake

Angeline, when it was found that there was a large quantity of mud that had collected in the lower parts of the lake bed, which must also be removed, and an additional expenditure of something like $20,000.00 was required for that purpose (Record pp. 136, 137).

The complainant declined to pay the same proportion of that expense as was required for the pumping of the water, for the reason that it was not interested in those portions of the lake bed where the mud had settled, and its proportion was finally settled at much less than that originally fixed by the contract (Record p. 181, letter of Jas. Laughlin, Prest.)

Since the completion of the first drainage, the continuous permanent drainage has been carried on by the Cleveland Iron Mining Company, and the expense has been borne by it and the Lake Superior Iron Company, as agreed, and the cost of such drainage, to the time of the hearing of this cause, appears in the testimony of Mr. Hall (Record pp. 136, 137 and 138).

The cost of the original drainage also appears in the testimony of the witness Youngbluth (Record, p. 220).

These two companies are still pumping and keep up the permanent drainage and are paying the expense thereof.

Mining and exploring was carried on by the respective parties in those portions of the lake bed owned by them respectively, as stated in the aforesaid ordinance passed at their request, each company confining itself to the portions of the lake bed above mentioned, and neither making any claim to any other part of the lake bed until about the time of the commencement of this suit.

The Cleveland Iron Mining Company proceeded to explore by drill holes, as above mentioned, and then by a drill hole driven from its drift in the north part

of the lake bed southerly to or near the section line, and then by a drift extending from the north part of the lake bed to the section line, and by lateral drifts, and after opening a body of ore in that way carried on mining in the lake bed down to the south line of section ten (10) (Record pp. 42 to 44, 190 to 193).

At one time the complainant took out ore a little over the section line, acknowledged its trespass and settled therefor; and later the Cleveland Iron Mining Company also mined over to the south side of the line, acknowledged its trespass and settled the same (Record pp. 59 to 60, 61, 62, 181, 184).

Numerous communications were had back and forth between the two companies during the entire period from the making of the pumping contract to the last of October, 1896, in which the respective ownership of the companies to the section line as a boundary was recognized as a settled fact (Record pp. 64, 72, 98, 99, 114-115, 117, 135, 185, 186, 187, 194 to 197, 207 to 210).

After the draining of the lake the Lake Superior Iron Company carried on explorations in the lake bed, by sinking diamond drill holes, in order to ascertain whether there was ore that could be profitably mined, and carried on such explorations by means of drill holes from January 1895, to September 29, 1896 (Record p. 139).

A body of iron ore was discovered by such drill holes, a part of which comes within the area now claimed by the complainant, and a part outside.

In 1895 and 1896 they opened up that deposit and have been mining on it ever since.

The explorations, so far as sinking drill holes was concerned, were carried on openly, in plain sight of the office of the complainant. Twelve of these holes

were within the territory claimed by the complainant in this case, and the last two of them were within a few feet of the section line. See Mr. Hall's testimony (Record pp. 138 to 142); also location of drill holes as shown on map marked Exhibit 2a on page 164.

During all this time complainant made no protest, did not even suggest to the Lake Superior Iron Company's agents that it was expending its money on the complainant's property, but on the contrary pointed out to the agent of the Lake Superior Iron Company the locality of the section line, in order to enable him to locate the point for sinking the drill holes near the line (Record pp. 139, 140, 143, 144, 152, 153).

The agent of the Lake Superior Iron Company was aware of the fact that mining and exploring operations were being carried on in the east part of the lake at great expense, by the Cleveland Iron Mining Company, and of the fact of its right to do so and to explore and mine as far as the section line was recognized by the complainant (Record p. 145).

The agent of the Pittsburg and Lake Angeline Iron Company, about the last of December, 1895, heard something about the decision of Michigan Supreme Court in the case of *Grand Rapids Ice and Coal Company v. South Grand Rapids Ice and Coal Company*, 102 Mich. 227, which had been decided something over a year before, and which defined the law of riparian proprietors differently from what he had been advised was the decision in the case of *Clute v. Fisher*. He again called upon his counsel for an opinion, which was furnished him about the 8th of February, 1896, which he says he communicated to the principal officers of the company. Still the mining and exploring operations carried on by the Cleveland Iron Mining Company, and the explorations carried on by the Lake

Superior Iron Company, continued, to the knowledge of the complainant; negotiations were had in relation to the property, defining and settling a trespass accidentally committed by the Cleveland Iron Mining Company (Record pp. 62, 111, 112, 184), obtaining permission to use portions of the lake bed for railroad track and stock pile, etc., and no claim whatever was ever made and communicated to either of the defendants that complainant claimed any portion of the lake bed north of the section line until October 29, 1896 (Record pp. 143, 144, 99).

Acting upon the settled understanding expressed in the ordinance above mentioned that the south line of section ten (10) was the boundary between the properties of the defendants on the north and the complainant on the south, the complainant carried on its mining in the south arm of the lake without regard to any center line thereof, and took out and removed a large quantity of iron ore that would come within the territory of the Cleveland Iron Mining Company if the lake bed was divided by the center line (Record pp. 53 to 55). In fact all the operations of all three companies, and all their negotiations and dealings with each other since the making of the contract, as well as before, down to the 29th of October, 1896, were carried on with reference to the boundary lines as affixed and settled upon at the time of making the pumping contract.

Lake Angeline is about a mile in length east and west, and 1,690 feet in width north and south on the center line of section ten (10), extended through the lake, which is about its widest point. These measurements are from shore to shore at the surface of the water as it originally stood (Record p. 163).

The Cleveland Iron Mining Company owns the entire east end of the lake, the Lake Superior Iron Company

owns the entire west end, and the Pittsburgh and Lake Angeline Iron Company's frontage is entirely on the south shore of the lake, except that it owns the east end and a portion of the north shore of the southeast arm of the lake.

The Lake Superior Iron Company claims:

1. That there has been a practical division of the lake bed between the parties; that contracts, explorations and mining operations have been carried on on the strength of such division for many years, in which large sums of money have been expended, without any certainty at the time of such expenditures that returns would be realized by the defendants therefrom, and that, by such division and long course of construction between the parties, the complainant is estopped to claim any portion of the lake bed lying north of the section line.

2. That the pumping contract, executed by the several parties, under their corporate seals, and expressly providing that it shall be binding upon the successors and assigns of the several parties, making it a contract running with the land, amounts to a division of the lake bed by deed duly executed by the several parties.

3. That the pumping contract is so entirely based upon the division of the lake bed above mentioned, and said division forms so essential a part of the contract, that, if such division be set aside or disregarded, the contract itself must fall; that, in such case, not only is the agreement to continue the drainage of the lake at the end, but either party has a right to demand that the drainage of the lake must stop and the water be allowed to rise to its original level—a result which, after all that has been done under the pumping contract, and in reliance upon it, would work great injustice to the defendants.

4. That if the original division of the lake be disregarded and a new division must be made, such division must be made by the middle line or thread of the lake, in accordance with the common law rule for division of the bed of fresh water streams.

STATEMENT OF CASE AS BEARING UPON THE JURISDICTION OF THIS COURT.

The Bill:

The case was commenced by bill filed by plaintiff in in error in the circuit court for the county of Marquette, Michigan, and the following is a substantial statement of the allegations of the bill, omitting long descriptions and detail of conveyances:

1. That the plaintiff and the two defendants are the several owners of certain parcels of land, described, which together comprise all the lands fronting on a small inland lake known as Lake Angeline, in the said county of Marquette.

The bill further sets up in detail the patents from the United States and the mesne conveyances through which said parties derive their title.

2. The bill sets forth that the parcels of land surrounding said lake are fractional, states the number of acres in the several fractions, and that the lands conveyed by the several patents were confined to the acreage of land outside the borders of said lake. It states that the patent of the United States covering the land owned by the Lake Superior Iron Company conveyed lots numbered 4, 5 and 6 and the northwest quarter of fractional southwest quarter of section ten (10), in township forty-seven (47) north, of range twenty-seven

(27) west, which tract of land, so conveyed, contained 112.20 acres according to the official plat of the township. It is expressly alleged by the bill that the patent describes the land by reference to the public surveys "and that said lands are described in said government offices by the government survey, not only as lots, but as the fractional southwest quarter of section ten (10) of said township and range *and as being outside of the limits of said inland lake*, and as containing 112.20 acres according to the government survey, *and outside of the meander lines of said inland lake.*"

As to the land owned by the Cleveland Iron Mining Company, the bill alleges that it was patented as the east half of section ten (10) and the fractional west half of section eleven (11), in township forty-seven (47) north, of range twenty-seven (27) west, containing 555.15 acres, "said acreage consisting in part of fractional government lots fronting on said inland lake, according to the government survey thereof." (Record p. 3.)

After setting forth the said government subdivisions constituting the east half of section ten (10) and the west half of section eleven (11) the bill proceeds: And your orator further alleges that said 555.15 acres was the total amount of acreage conveyed to said Lorenzo D. Burnell [the patentee] by the United States government, and the said fractional portions of said lands above described constitute the territory bordering on said inland lake. * * * And your orator further alleges that the said Burnell and his grantees have acquired no title to the territory covered by said inland lake, except as acquired on account of their ownership of said lots 2, 3 and 7 of said fractional section ten (10), and lot 1 of said fractional section eleven (11), so fronting on said inland lake, and that said frontage ownership of said lake *by operation of law* and

not by *metes and bounds* vested in said Burnell and his grantees the riparian ownership of said inland lake outside said lots 2, 3 and 7 of said fractional section ten (10) and said lot 1 of said fractional section eleven (11) to the center of said lake, and a right to the land to the center of said lake to a common point of ownership, *to be equitably determined between all the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity.*" (Record p. 5.)

The bill proceeds to set forth the several patents by which the lands owned by the plaintiff were conveyed to the several patentees, in which the lands are described as lots, or fractions, containing a certain acreage therein mentioned.

After stating the various mesne conveyances by which the title had become vested in the plaintiff, the bill further sets forth that the plaintiff has been in possession of said fractional lots for many years.

3. The bill sets forth that the several fractions described "constitute the entire territory fronting on said inland lake known and described as Lake Angeline, above referred to, and that all the said fractional government descriptions of said land so fronting on said lake are owned by the plaintiff or the defendants as above stated according to the specific interests of each as herein set forth, and your orator alleges that the said abutting owners upon said inland lake are owners of the land and minerals under said lake according to the amount of frontage land upon the said lake owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake, as determined and equitably designated between the plaintiff and the defendants by the rules of equity" (Record pp. 8 and 9).

4. That within four or five years last past, the

plaintiff and the two defendants have by mutual consent shared in the expense of pumping out and draining said lake, each bearing a certain portion of the expense, so that the lake has been drained of water, except what is easily disposed of by moderate pumping.

5. That the territory covered by said lake belonging to the plaintiff "would be" the land embraced in certain triangles fully set forth and described in the bill, having for their basis the shore line of the plaintiff's lots of land abutting on the lake and having a common apex at a point in the lake which is styled in the bill as the "equitable center". The plaintiff attaches to the bill a map of the lake, or rather a map of the meander lines of the lake (which do not at all correspond with the shore lines) and lays down on this map the lines which, according to its idea of an equitable apportionment, would, or ought to be considered as belonging to it.

6. That said plaintiff owns "said territory formerly under the water of said inland lake, by virtue of its riparian ownership as abutting owner upon the south side of said inland lake, under the laws of riparian ownership established by the decisions of the courts of the state of Michigan and of the United States as well as other states and countries".

It further states that the Lake Superior Iron Company owns, "on account of its frontage upon the said inland lake", a certain portion of the original bed of the lake, and that the Cleveland Iron Mining Company "owns on account of its frontage above described", a certain other portion of the bed of the lake; and then follows the allegation: "And your orator alleges that it and the said defendants are the owners of the entire territory formerly covered by the water of the said inland lake known as Lake Angeline, and that the exact

boundary lines of ownership have never been established and fixed between your orator and the said defendants, and your orator desires that the same be fixed and established by the decree of this honorable court in accordance with the principles of law and equity" (Record pp. 11 and 12).

7. That the defendants assert ownership to all the lake bed lying north of the south line of section ten (10) extended through the lake and are proceeding with explorations and mining operations thereon, "utterly disregarding in their claim the long established principles of law as to riparian ownership of abutters on an inland lake", and without recognizing the right of the complainant to those portions of the lake bed claimed by it. (Record p. 12).

8. After praying for an injunction, the bill prays for the following relief:

"That this honorable court decree a designation of the territory owned by your orator and the said defendants by lines that shall equitably locate the territory of your orator and the said defendants;" and further prays that the plaintiff may be decreed to be the owner of those portions of the lake bed mapped out by it on the diagram annexed to its bill.

In this connection we call attention to the entire want of anything contained in the plaintiff's bill constituting a claim of "any title, right, privilege, or immunity under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States". That it is not only true that the complainant did not claim that the patents of the United States conveyed any title or interest in the lake bed, but it expressly claimed and asserted by the bill that the land conveyed by the patents was limited to the area outside of the shore line, and that the rights

of the abutting owners in the lake bed were conferred, not by patent but by the rules of the common law, as the same were in force in the state of Michigan.

We also call attention to those portions of the biil which assert that the lines of the several holdings have never been established, and that a division by agreement or by decree of a court of equity in accordance with equitable principles is necessary.

The Answers.

The answers of both defendants set up at length the facts, a condensed statement of which is hereinbefore given, constituting an estoppel, and showing that the parties had made a division of the lake bed among themselves; and the Cleveland Iron Mining Company made the further claim that by its patent of the east half of section ten (10) and the west half of section eleven (11), the bed of the lake was conveyed as well as the up-land. The several patents and conveyances and, in fact, the title of the lands abutting on the lake, as alleged by the complainant, were admitted by the defendants.

The Case as Presented by Plaintiff's Counsel in the State Court.

Plaintiff's counsel in their brief in submitting the case to the supreme court of Michigan, urged at great length and with numerous citations of authority:

1. That in the case of irregular shaped lakes like

Lake Angeline it was impossible to lay down lines mathematically to separate and define the ownership of abutting properties in the bed of the lake and that for that purpose it is absolutely necessary that there be a division by agreement among the abutting owners themselves, or something in the nature of a partition by a court of equity.

2. That the patents of the United States did not purport to convey and did not convey any of the land or bed of the lake covered by the water, but conveyed only the upland and, as claimed by them, only such as lay outside of the meander lines.

Further, that the United States had no title, at the the time the patents were issued, to the bed of the lake, and that the officers of the Land Department, and the President of the United States, had no power to convey the bed of the lake; that the title to the bed of the lake vested in the state of Michigan at the time it was admitted as a sovereign state into the union, and that the ownership and disposition of the bed of the lake depends, and did at that time depend, entirely upon the law of the state.

Decision.

The decision of the circuit court, which is found on pages 235 to 246 of the Record, deals entirely with the question of estoppel. The court arrived at the conclusion that the parties had agreed upon a partition and that, by a long series of acts, and the expenditure of immense sums of money by the several parties in reliance upon the division so made, all parties were

estopped to assert rights contrary to the division so made, and dismissed the plaintiff's bill.

This decision and opinion of the Supreme Court of the state, in which the facts of the case are fully set forth, and the decision of the court given, is found on pages 248 to 264 of the Record.

The decision fully recognizes the title of the abutting owners to the bed of the lake, in accordance with the principles of common law as asserted by the plaintiff in its bill, and as expounded by the previous decisions of the court.

The claim of ownership made by the plaintiff to its proper proportion of the lake bed by virtue of its frontage, was also fully recognized.

Conceding the law as claimed by the plaintiff, the court decided:

(1) That the parties had by agreement under seal (referring to the pumping contract), deliberately apportioned and divided the lake bed between them (Record p. 259).

(2) That moneys had been expended, risks incurred, and acts done by which the plaintiff was estopped to question the validity or correctness of that division, and was estopped to claim any title contrary to the lines as thereby established (Record p. 261).

(3) That the plaintiff was entirely without equity (Record p. 263).

(4) The plaintiff was guilty of laches in keeping silence when it ought to have spoken (Record p. 263).

ARGUMENT.

I

The writ of error should be dismissed for want of jurisdiction.

It is the settled law of this court that to give the court jurisdiction of a writ of error to a state court, "It must appear affirmatively not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered, could not have been given without deciding it; that where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States another question not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Harrison v. Morton, 171 U. S. 38 at 47.
Pierce v. Somerset Railway, 171 U. S. 641.
White v. Leovy, 174 U. S. 91, 96.
Remington Paper Co. v. Watson, 173 U. S. 443.
McQuade v. Trenton, 172 U. S. 636, 639.
Chappell Chemical Co. v. Sulphur Mines Co. 172 U. S. 465, 471.
Capital Bank v. Cadiz Bank, 172 U. S. 425.

It affirmatively and distinctly appears from the record in this cause: First, that no Federal question necessary to the determination of the cause was presented to the state court for decision; Second, that the

judgment as rendered by the state court could have been rendered without deciding any Federal question; Third, that three questions not Federal were raised in the cause before thestate court and were decided by that court against the plaintiff in error, which decision upon each of those questions is sufficient to sustain the judgment rendered.

Those questions were questions of estoppel against the plaintiff in error, want of equity, and laches on the part of the plaintiff in error.

The subject of controversy in this suit is the title to the bed of Lake Angeline, the land on the shores of the lake being owned in severalty by the parties to the suit.

The Federal question which the plaintiff claims in this court to be presented is this viz: That the portion of the lake bed to which it asserts title was granted and conveyed to it by the patent of the United States.

The plaintiff's claim in this court is thus stated in the brief of its counsel (page 9). Referring to that part of the bed of the lake to which the plaintiff asserts title, the brief says: "This title to about thirty acres of mining territory adjacent to complainant's mine, under the lake and extending from its center to the south line of section 10 if projected east and west through the lake, is in dispute in this cause, complainant and defendant *each claiming it through patents from the United States government.*"

There was no claim made to the state court that the plaintiff in error claimed title to this disputed lake bed through patents from the United States government.

The only claim made in the state court by *the plaintiff in error* through patents from the United States government was this, viz: That under such patents it obtained ownership to the *lands bordering on the lake*, under the descriptions of lots 2, 3, 4, 5 and 6 of section 15.

Its further claim was, that having acquired such ownership of the lands bordering on the lake, it became, *by the laws of the state of Michigan*, the owner of the portion of the lake bed to which it asserts title.

Its ownership, through the patents of the United States government, of the lands claimed by it bordering on the lake, was not disputed in the case, and no decision was made against such ownership by the court.

The decision of the court was, that by reason of the contract made between the plaintiff in error and the defendants, of date March 17th, 1892 (being plaintiff's Exhibit I, Record pp. 88 to 94), and the acts of the parties done under and in pursuance of such contract, the plaintiff in error was estopped to assert its claim to that portion of the lake bed now claimed by it.

The court further decided that under the facts relating to the making of such contract, and the acts of the parties, and the outlay made by the defendants in pursuance of the contract, with the knowledge of the plaintiff, the plaintiff was "entirely without equity", and was guilty of laches "in keeping silence when it ought to have spoken".

Each of these questions decided by the state court was sufficient to dispose of the cause without reference to any federal question, and without reference to the source of the plaintiff's title to or rights in the lake bed.

The claim of the plaintiff in error, as presented to the state court, in reference to its title to that portion of the lake bed which is the subject of controversy.

First—The claim as stated in the bill of complaint.

The bill states the patent and conveyances by which the Lake Superior Iron Company acquired its title to its lands bordering upon the lake, in paragraphs *first* and *second*, pages 1, 2 and 3 of the Record, and follows the statement of the patent and conveyances with this statement, on page 3: "And said lands are described in said government offices by the government survey, not only as lots but as the fractional southwest quarter of section ten (10) of said township and range, *and as being outside of the limits of the said inland lake, and as containing one hundred and twelve and twenty one-hundredths (112.20) acres, according to government survey, and outside of the meander lines of said inland lake, and within the section lines and quarter-post lines of the said section ten (10), as fixed by government survey.*"

The bill then states the patent and conveyances by which the Cleveland Iron Mining Company acquired title to the lands bordering upon the lake, in paragraphs *three* and *four*, on pages 3, 4 and 5 of the Record. After specifying such patent and conveyances, the patent having been issued to Lorenzo D. Burnell, the bill states as follows, on page 5: "And your orator further alleges that the said Burnell and his grantees have acquired no title to the territory covered by said inland lake, except as acquired on account of their ownership of said lots two (2), three (3) and seven (7)

of said fractional section ten (10), and lot one (1) of said fractional section eleven (11) so fronting upon said inland lake, and that said frontage ownership on said lake *by operation of law, and not by metes and bounds, vested in said Burnell and his grantees the riparian ownership of said inland lake opposite said lots two (2), three (3) and seven (7) of said fractional section ten (10), and said lot one (1) of said fractional section eleven (11) to the center of said lake, and a right to the land to the center of said lake to a common point of ownership* **to be equitably determined between all of the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity; your orator alleging that each of said abutting owners are entitled to the territory under said lake to the center thereof, from their own abutting ownership."**

The bill then states the patents and conveyances by which the complainant (the plaintiff in error) acquired title to its lands bordering on the lake (paragraphs *five* and *six*, pages 5, 6, 7, 8 and 9 of the Record).

Referring to its lots 3, 4 and 5, the bill says, on page 6: "And your orator, *as the owner of said fractional lots* three (3), four (4) and five (5) of said section fifteen (15) *is the owner of the riparian rights on said inland lake, and of the land under said lake to its center.*"

Referring to its lot six, the bill says, page 8: "And your orator further alleges that by virtue of said last named deed your orator acquired all the right, title and interest of said defendant, to the said lot six (6), *and its abutting riparian ownership, to the center of said Lake Angeline*, except the minerals thereunder, and the right to remove said minerals therefrom."

Having stated the title of each of the parties to this

suit to their lands bordering on the lake in the above manner, and referring to all the lands bordering on the lake owned by the three parties, the bill says (pages 8 and 9 of the Record): "Your orator further alleges that said fractional southwest quarter of the southwest quarter of said section eleven (11), and said lots two (2), three (3), four (4), five (5), six (6) and seven (7) of said section ten (10), and lots two (2), three (3), four (4) and five (5) of said section fifteen (15), constitutes the entire territory fronting on said inland lake, known and described as 'Lake Angeline', above referred to; and that all the said fractional government descriptions of said land so fronting on said lake, are owned by the complainant, or the defendants above referred to, according to the specific interests of each, as herein set forth. And your orator alleges that the said abutting owners upon said inland lake are owners of the land and minerals under said lake, according to the amount of frontage land upon the said lake owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake, *as determined and equitably designated between the complainant and the defendants by the rules of equity.*"

After these statements of the titles of the respective parties, it then states the plaintiff's claim to the specific part of the lake bed claimed by it, as follows (p. 10 of the Record): "And your orator further alleges that the territory covered by the said lake belonging to and owned by your orator *by virtue of the ownership of said lots* two (2), three (3), four (4) and five (5) of said section fifteen (15) bordering upon the shore of said inland lake, would be that territory described as follows:" Then follows a description by metes and bounds.

Having stated in the above manner the specific par-

cels of land bordering on the lake owned by each of the parties, and the patents and conveyances through which their respective ownerships were acquired, the bill states the complainant's title to that part of the lake bed which it claims in the following manner (Record p. 11):

"*And your orator alleges that it owns said territory formerly under the water of said inland lake by virtue of its riparian ownership, as abutting owner upon the south side of said inland lake, under the laws of property ownership, established by the decisions of the courts of the State of Michigan and of the United States, as well as other states and countries.*"

The above statements of the bill of complaint constitute the entire of the claims made by the plaintiff in error of its title to the property in dispute.

The attention of the court is especially invited to these points presented by the bill of complaint, viz:

(*a*) That by the bill no claim is made that title to the lake bed was conveyed by the patent of the United States, or that the title to the lake bed was acquired through such patent.

(*b*) The ~~defendant's~~ plaintiff's asserted claim is that the plaintiff in error obtained its title *to the lands bordering on the lake* through the United States patent, and that its ownership and title to the lake bed is under and by virtue of its "riparian ownership as abutting owner upon the south side of said inland lake, *under the laws of property ownership, established by the decisions of the courts of the State of Michigan and of the United States, as well as other states and countries.*"

This is simply the complainant's way of saying that it derives its title to the lake bed through the common law of this country, which law attaches ownership of

inland lake beds to riparian ownership of the adjoining land.

Most clearly this claim of ownership thus made does not present a Federal question.

Second—The case presented by the bill relating to the boundaries of the part of the lake bed in controversy.

The bill shows that the boundaries of the portion of the lake bed to which the plaintiff asserts title ~~were~~ was not defined by any of the means through which it derived its alleged title. The several allegations of the bill to the point are as follows:

On page 5 of the Record, referring to the ownership of the Cleveland Iron Mining Company of its lake frontage, the bill says: "And that said frontage ownership on said lake *by operation of law, and not by metes and bounds*, vested in said Burnell and his grantees the riparian ownership of said inland lake opposite said lots two (2), three (3) and seven (7) of said fractional section ten (10), and said lot one (1) of said fractional section eleven (11) to the center of said lake, and a right to the land to the center of said lake, to a common point of ownership to be equitably determined between all of the abutting owners upon said inland lake, *either by mutual consent or by determination of a court of equity.*"

On page 9 of the Record, the bill states as follows: "And your orator alleges that the said abutting owners upon said inland lake are owners of the land and minerals under said lake, according to the amount of frontage land upon the said lake, owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake,

as determined and equitably designated between the complainant and the defendants by the rules of equity."

On page 12 of the Record, the statement of the bill is as follows: "And your orator alleges that it and the said defendants are the owners of the entire territory, formerly covered by the water of the said inland lake, known as Lake Angeline, *and that the exact boundary lines of ownership have never been established and fixed between your orator and the said defendants, and your orator desires that the same may be fixed and established by the decree of this honorable court, in accordance with the principles of law and equity.*"

On page 13, the prayer of the bill says: "That this honorable court decree a designation of the territory owned by your orator and the said defendants, *by lines that shall equitably locate the territory of your orator and the said defendants.*"

In this manner the bill presents the case of unsettled and undefined boundaries of the property in dispute.

The designation by the bill, on pages 10 and 11 of the Record, of the boundaries claimed by the plaintiff is based upon a mere assumption.

The bill having stated that the plaintiff's title to the bed of the lake is acquired through the common law which apportions the lake bed to the riparian owners, the boundaries would necessarily be such as the application of the principles of that law would define them, and their location would depend upon a consideration of the entire contour of the shores of the lake, including its body and arms, and also the contour or shape of the shore of the several portions belonging to the different owners and their relations to each other as well as to the entire of the lake.

Third—The case presented to the state court by the plaintiff's evidence.

The evidence of the plaintiff related to the conveyances by which it acquired title to its lands, the designation upon maps of the portion of the lake bed to which the plaintiff laid claim, the negotiations which led up to the making of the contract of March 17th, 1892, between the parties to this suit, the acts of the parties under that contract, and the extent to which the plaintiff claims the defendants had trespassed by exploration and mining upon that portion of the lake bed to which it makes claim.

From this evidence it appeared that the boundaries of the part of the lake bed claimed by the plaintiff could only be determined by an agreement between the parties, or by a decree of a court of equity.

It also appeared that the parties had entered into an agreement of March 17th, 1892, to adjust the boundaries of their respective portions of the lake bed.

The evidence in respect to the boundaries of the property in dispute appears in the testimony of the plaintiff's witness, E. F. Bradt, on pages 36 to 40 and 46 to 50 of the record.

The testimony of this witness shows that at the request of the plaintiff's counsel he made maps of Lake Angeline from the field notes of the government survey, and from another map.

On the maps, by direction of the plaintiff's counsel, he drew lines to define the portion of the lake bed which the plaintiff claims. He made no measurements and ran no lines upon the ground or lake for the purpose of locating or mapping such portion of the lake bed.

The maps made by him are Plaintiff's "Exhibit A" (p. 14) and "Exhibit F" (p. 40 of the Record).

Upon cross-examination the witness says that in making the maps he had nothing to do with the lake itself, as it actually existed. He simply made his maps from the field notes. (R. pp. 47, 48, 49).

In drawing the lines upon the maps to designate the part of the lake bed claimed by the plaintiff, he simply drew those lines as the plaintiff's counsel directed him to draw them.

These lines were not run or measured on the ground and have not in any way been proved. (R. pp. 48, 49).

The center point in the lake bed, to which the lines converge to show the part of the lake bed claimed by the plaintiff was a point not found or fixed by the witness from any measurements made or from any data possessed by him. This point was located on the map by the plaintiff's counsel taking his pencil and designating the point as a point to be "considered the equitable center," and from that point so designated he then drew his lines.

The witness says if the original corners could be found, (and he does not know whether they could be found or not) it might turn out that the location on the map might be erroneous both as to corners and distances. (R. pp. 49, 50, 51).

The witness paid no attention as to what frontage would belong to other portions of the shore, and he shows that by adopting the "equitable center" which he made use of in preparing his maps, in an actual division of the lake bed, portions of the shore of the lake, and which portions were owned by the defendants, would be allowed no lake frontage at all. (R. pp. 81, 82, 83).

Evidence was given by the plaintiff's witness, Alfred

Kidder, who was the plaintiff's general agent, that the plaintiff was in doubt as to whether it had any rights at all in the part of the lake now in controversy, and being in doubt, obtained the advice of the plaintiff's counsel, Mr. Clark, which advice confirmed those doubts, and acting thereupon, the plaintiff removed its buildings from that part of the lake, in the year 1887. (R. pp. 84, 86, 87. 101, 102).

Coming to the contract of March 17, 1892, made between the parties to this suit, which is plaintiff's "Exhibit I" (Record pp. 88, 89, etc.), the bill of complaint contains this averment, on page 10 of the Record, in reference to the contract, viz: "And your orator further alleges that within the last four or five years, by mutual consent, your orator and the said defendants shared in the expense of pumping out and draining the said inland lake; your orator paying three-fifteenths of said expense, the defendant, The Lake Superior Iron Company, four-fifteenths, and the Cleveland Iron Mining Company the balance, so that now said lake has been drained of water, except what is easily disposed of by moderate pumping."

The plaintiff's evidence shows that *after* its doubts had arisen in reference to its ownership of the part of the lake bed in controversy, and acting upon those doubts, it had removed its buildings therefrom, it negotiated with the defendants for and made with them the said contract of March 17th, 1892.

The plaintiff gave evidence also of the acts done by the defendants under the contract, and the acts of the defendants after the contract was made in exploring and mining in this disputed ground.

E. F. Bradt, R. pp. 42 to 46, 53 to 84.
Alfred Kidder, R. pp. 95 to 115.
Thomas Walters, R. pp. 115 to 128.
James Read, R. pp. 128 to 131
William Tregambo, R. pp. 131 to 135.

The defendants gave evidence upon the same points, showing the acts done and the expenditures made by them upon the faith of the contract, and the acts of recognition on the part of the plaintiff of the ownership of the Cleveland Iron Mining Company of that part of the lake bed which the plaintiff now claims (Record pp. 135 to 223).

Fourth—The claim which was made by the plaintiff in error upon the hearing in the state court, upon which it sought the decision of the court.

This claim appears in the brief of plaintiff's counsel, Clark & Pearl, presented in the state court, a copy of which, with the consent of this court, will be filed with the clerk of the court, and to which reference is respectfully requested.

The position taken in the brief in reference to the title to the bed of the lake is distinctly this, viz: That such title was not conveyed by the patent of the United States government; that the conveyance of the patent was limited to the shores of the lake, as defined by the meander line of the government survey, and that the title to the bed of the lake was acquired under and by the state law of the state of Michigan.

Speaking upon this point, the brief says (page 6); "Further, the drafting of a patent and signing the same by the President, that proposed to convey any portion of an inland water, would be *nullity;* as neither the president, or the draftsmen, had any authority to convey more acreage than the "*fractional lots*" consisting of the upland, outside of the meander lines of the lake. It has been so held by the supreme court of the United States, and the supreme court of the different

states, to which decisions we refer below, and for the reason that from the time Michigan became a state, *it has been the owner of the inland lakes and rivers*, as ceded to the state by general government; as all inland lakes and rivers are by the law of the United States, made the property *of the state*, when it takes on statehood; and the purchaser of fractional lots abutting on inland lakes, purchasing from the United States government, acquires right and title to the land under the water abutting their ownership of the fractional lots as riparian owners, according to the rules of law *fixed by the state.*

Upon page 20 of the brief, the statement is: "That in making the patent, it was not the intention of the conveyancers to *disregard the provisions of law*, and include any of the territory covered by the lake (see p. 59 of Record); and showing that it was the intention to include that *only* which was outside of the meander lines, and that only the lots were included in the patent."

On pages 22 and 23 the statement of the brief is as follows: "It is beyond controversy that the supreme Court of the United States has held that the *state has control* of the waters of inland lakes and rivers, and according to the law of the state, those riparian rights were disposed of, and belong to adjacent owners."

"So it is apparent that *from the time Michigan became a state, it controlled the beneficial ownership of these inland lakes and rivers*, and they were vested *in the state* as held by the Supreme Court of the United States in the cases just cited. For that reason *the Land Department had no jurisdiction to transfer any of the territory under the lake or within the meander limits;* for, as said by the learned judge quoted above, *the territory had been previously disposed of and was so disposed of when*

the state was admitted into the Union, and it could only be controlled by the law of the state. That being so, no matter what may have been the intent of the scribe who wrote the patent or the President who signed the same there could be no conveyance of any territory within the meander lines of the lake, and of the territory submerged by the lake."

Then, after quoting from the case of Hardin v. Jordan, 140 U. S. 402, and referring to other authorities to sustain the above position, the brief says (pp. 26, 27) as follows: "As we have pointed out, the portion covered by the inland lake had *passed to the state*, when it ceased to be a territory, and became a state; and the disposition of that inland water was in accordance with the law of the state; and the question now is: *what is the law of this state as to riparian ownership upon inland lakes, ponds and rivers?*"

The italics are those of the brief.

The brief then proceeds to quote from decisions of the Supreme Court of the State of Michigan, and having done so, says (pp. 28, 29) "Further, by undoubted authority, the United States Government could convey no more than the amount of the lands outside of the waters of the lake, as the United States government *had no title to the territory under the lake, and no control over it.* That title and right of control *was vested in the state*, as shown by the authorities cited above."

The brief of Mr. Alfred Russell, counsel for the plaintiff in error in the state court, leave to file which with the clerk of this court is requested, takes the same position. It says (p. 20) "The law of the case, as to the division of the former bed of the lake, is, beyond question, settled by the late case of Ice & Coal Co. 102

Mich., 227, and Hardin vs. Jordan, 140 U. S. 371, disaffirming Clute vs. Fisher, 65 Mich."

The whole claim of the plaintiff before the state court was tersely summed up by Mr. Alfred Russell, counsel for the plaintiff, in his brief, on page 34, as follows:

"The whole jurisdiction in the case arises from the fact, (1), that three adjacent parcels of land, described in patents, are held by the three respective owners under purely legal titles; and, (2), from the fact that the *law of Michigan*, (not the grantor in the patents,) gives the grantees (as attached to those titles,) certain riparian rights in the center of the lake; and, (3), from the fact that the boundaries, not between the parcels of land granted, but between the apportioned riparian rights appurtenant to these parcels, become interlocking on account of the shape of the water bed and must be adjusted."

The case of Hardin v. Jordan, 140 U. S., 371, is cited in the plaintiff's principal brief of Messrs. Clark & Pearl, as deciding that the title to the bed of the lake is acquired not through a United States patent, but through the local law of the state, and unquestionably such is the law.

Barney v. Keokuk, 140 U. S. 402.
St. Louis v. Ritz, 138 U. S. 226.

The point is pressed upon the attention of the court that the plaintiff in error expressly repudiated any and all claim of title to the property in dispute through a patent of the United States government.

Fifth. **It is respectfully submitted from the foregoing review of the case made by the plaintiff in error, by its bill of complaint, its evidence, and its presentation to the state court, that no Feder-**

al right or title was set up or claimed in the state court to the property in controversy, nor was any Federal question there raised in such manner as to give jurisdiction to this court to review the judgment of the state court.

To give this court jurisdiction it was necessary for the plaintiff in error to specially set up the claim which constituted a federal question upon which it relied in this court for a review of the judgment in the state court.

Water Power Co. v. Street R'y Co., 172 U. S. 475, 488.
Oxley Stave Co. v. Butler County, 166 U. S. 648 at 658, 659.
Sayward v. Denny, 158 U. S., 180 at 183, 184.
Green Bay &c. Canal Co. v. Patten Paper Co., 172 U. S. 58 at 67, 68.
Capital Bank v. Cadiz Bank, 172 U. S. 425.
Chicago & Northwestern R. Co. v. Chicago, 164 U. S. 454, at 457.

In Sayward v. Denny, 158 U. S. 183, 184, it is stated that certain propositions must be regarded as settled, among which were that "the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way," and that the right on which the party relies, "must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed."

In Chicago & Northwestern Railway Co. v. Chicago, 164 U. S. (at page 457), the language of the court is: "This court has no authority to review the final judgment of the highest court of a state in which a decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege, or immunity protected by the constitution of the

United States, unless the party, against whom such judgment was rendered, 'specially set up or claimed' such right under that instrument. Rev. Stat. § 709.

"It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law, in violation of the fourteenth amendment of the constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts or either of them any right under the constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any federal right was specially set up or claimed in the supreme court of the state."

In Oxley Stave Co. v. Butler County, 166 U. S. (pp. 654, 655), the court referring to the words "specially set up or claimed" in section 709 of the Revised Statutes, says:

"These words were in the Twenty-fifth Section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially", that is, unmis-

takably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular State does not import that he is a citizen of that State. *Brown v. Keene*, 8 Pet. 112, 115; *Robertson v. Cease*, 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

The first suggestion of a right claimed by the plaintiff under the laws of the United States is made by the petition of the plaintiff to this court for the allowance of a writ of error. We quote the language of Mr. Justice Gray, in deciding the recent case of *Scudder v. Coler* (Oct. 19, 1899), as peculiarly applicable to this case.

"No mention of the Constitution of the United States or of any provision thereof, by the plaintiff in error, or by the Court is to be found at any stage of the case while it was pending in the courts of the State of New York; and it is impossible upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the State."

Substitute "law" for "constitution" and "Michigan" for "New York" in this quotation and we have exactly the case at bar.

There is no opportunity for the inference to be drawn that a claim of title to the lake bed was set up as a Federal right.

The Decision of the State Court.

The contention of the plaintiff in error in this court is that in the State Court the complainant claimed the bed of the lake through patents of the United States Government and that the Court decided against such claim, and held that it had no title to the disputed territory, and that "*This is the real issue in this case.*" (Plaintiff's brief in this court pp. 9, 10, 11).

(*a*) We have shown above that the plaintiff did not claim title to the bed of the lake through patents of the United States; that it only claimed title through such patents to the lands bordering on the lake, which title was not denied or in dispute; that it claimed title to the bed of the lake, or property in dispute, under and by means of the local law of the state.

(*b*) The State Court did not decide or hold that the plaintiff did not acquire title under the United States patents to the shore of the lake, and it did not decide or hold that the plaintiff did not acquire title *to the territory in dispute*, nor did the court decide that the complainant owned no lands north of the section line.

The claims must have been made by the appellant, before the state court, under a law of the United States and the decision must have been adverse to that claim.

Church v. Kelsey, 121 U. S. 282.
Clark v. Penna, 128 U. S. 395.

Gray v. Coon, 154 U. S. 589.
Susquehanna Boom Co. v. W. Branch Boom Co. 110 U. S. 57.
Murdock v. Memphis, 20 Wall. 590, 635-6.
Simmerman v. Nebraska, 116 U. S. 54.

It must affirmatively appear from the record that a decision has been made on one or more of the questions specified in sec. 709 of the Revised Statutes, and in the way there mentioned, that is, against the claim made.

Detroit City R'y Co. v. Guthard, 114 U. S. 133.
Endowment & Ben. Ass'n v. Kansas, 120 U. S. 103.
Gray v. Coon, 154 U. S. 589.

The court made no decision against the plaintiff's original ownership of the disputed property.

The decision of the court appears in the Record (pp. 248 to 264).

A brief statement of the case is made in which it is stated that, "The three parties to this litigation own all the lands surrounding this lake; the complainant owning that part of section 15 bordering upon the lake."

The making of the agreement of March ~~7th~~ 17th, 1892, and the acts of the parties done in pursuance of and reliance upon this agreement are stated. After this statement follows the opinion.

The opinion of the Court begins with this statement (R. p. 254): "The theory of the complainant's bill is that the teritory formerly covered by the waters of this lake should be *divided* among the shore-owners in proportion to the amount of shore frontage owned by each; that such ownership extends to the center of the lake to be equitably established by the court; and that such territory should be partitioned by convergent lines drawn from the outside limit of each frontage to a convergent point called the equitable center. To

the bill is attached a map purporting to contain such equitable division."

The opinion shows that the result of such a division, "would give the complainant the entire southeast arm of the lake, and from two-thirds to three-quarters of the west arm."

The opinion then states the claim of each of the defendants in which an estoppel is asserted against the complainant's claim, and the opinion then states, in reference to the complainant's theory of the division as follows (R. p. 256):

"The difficulty in apportioning the territory according to the theory of complainant is apparent from its irregular form. It seems conceded by the learned counsel for the complainant *that the division according to the diagram, made a part of its bill, cannot be sustained*, because they concede that it may be more equitable to divide the two arms of the lake according to the river rule, viz: the medium *filum aquae*.

"It must also be conceded that the Cleveland Iron Mining Company under this rule would be entitled to some of the territory lying under the southeast arm of the lake south of the section line."

After stating the complications resulting from such a division, the opinion says (Record p. 257): "No fixed rule ever has been or ever can be laid down for the division of the territory covered by these inland lakes with their irregular shores. Each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible."

The court then refers to the testimony in which the equitable center noted on the complainant's map was established in the case, and refers to the testimony of the witness E. F. Bradt, who made the map, which testimony has been above quoted.

The court adds, after quoting from that testimony (Record p. 257): "This same witness also admits that the apportionment of his diagram deprives the C. I. M. Co. of any frontage on the southwest shore of lot 7.

"The above statement is sufficient to show *the difficulty in making an equitable apportionment*, and while nothing was said during the negotiations leading up to the agreement, or in the agreement itself, *in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood.* It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt.

Complainant had discovered a mine on its territory south of the line and extending under an arm of the lake. At that time it was the only one which it was known would be benefitted by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine whether there existed, under the bed of the lake, ore worth mining.

"The contract, if valid, established the line beyond dispute.

"*The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this contract*, recognized as valid and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of Clute v. Fisher, 65 Mich. 48, as establishing the rule that the territory should be divided by the government lines, and that it rested upon that case as the estab-

lished law until the decision of Ice & Coal Co. vs. Ice & Coal Co., 102 Mich. 227, claiming that the latter overruled the former, and that in making that contract there was a mutual mistake which entitles it to the relief prayed."

The opinion then discusses this attempt on the part of the complainant to remove out of its way the obstacle of that contract, and states the conclusion of the court upon that subject, and decides upon the effect of the contract, as a valid contract (Record pp. 261, 262) as follows: "We are therefore of the opinion that this case does not come within any exception to the rule that a mistake of law does not furnish any ground for relief.

"Do the contract, settling the boundary line, and acquiescence therein and the acts done thereunder estop the complainant to now assert a different line? The rule is settled by the decisions of this court that where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and parties have for any considerable time recognized them, they will be upheld though title by adverse possession could not be maintained.

Joyce v. Williams, 26 Mich. 33.
Smith v. Hamilton, 20 *id.* 433.
Jones v. Pashby, 67 *id.* 459."

"According to the testimony on the part of the plaintiff, there was a dispute as to the boundary line. Mr. Kidder testified that the superintendent of the C. I. M. Co. asked him for a deed of the land lying north of the section line, and that he for his company declined to give it, making the same claim that he now asserts If his testimony be true, and for this purpose the company must stand by its own testimony, there

was a dispute and it was settled by the agreement. Complainant recognized it for nearly five years and saw all these expenditures made by the defendants without protest.

"Complainant, however, invokes the doctrine that title to land cannot rest on estoppel on account of the statute of frauds, and that a vote of three-fifths of the entire stock of the company is essential under the statute to convey title. The obvious reply to the first proposition is that it is also established that the statute of frauds does not apply to boundary lines, and that the doctrine of estoppel will be applied to the voluntary adjustment of disputed boundaries.

Hayes v. Livingston, 34 Mich. 384–380.

"Under the theory of complainant corporations could not settle boundary lines without a meeting of the stockholders called to pass upon the alienation of its lands, and the doctrine of estoppel could never be applied to a boundary line between corporations or between a corporation and an individual.

"So, too, in reply to the second proposition it may be said that the statute does not apply to the voluntary adjustment of these lines, but to alienation by deed of conveyance. Complainant was not alienating, dividing or selling any of its real estate within the language of the statute.

How. St., Sec. 4052.

"Alienation means in law a transfer of title by conveyance.

Webster.
The Century Dictionary and Cyclopedia.

"The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line even under its own theory, which could be measured by metes and bounds.

How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders.

"The contract was the act of the three parties to it. It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well as the defendants, paid out large sums of money under it. All are now estopped to deny its due execution and validity."

It is very clear that in the foregoing opinion of the court, the original ownership of the complainant, as well as of the defendants, in the bed of the lake was *assumed and recognized by the court*, and that the question dealt with by the court was *the theory of the complainant's apportionment*, and the obstacle in the way of that apportionment which was created by the agreement of March 17th, 1892.

The court dealt with the objections which were made by the plaintiff to that agreement, viz.: (1) That it was made under a mistake; (2) that title to land cannot rest on estoppel; (3) that a vote of three-fifths of the entire stock of the company is essential under the state statute to convey title.

None of these objections presented a Federal question. They were all overruled by the Court without reference to any Federal question.

They were disposed of by the court on the ground that the boundary lines of the disputed territory were unsettled, and for that reason a proper case was presented for the parties themselves, by contract, to establish the boundary lines between their respective ownerships; that the contract was a contract made for

that purpose, and that it was valid, notwithstanding the objections made thereto by the plaintiff.

The language used by the Court on page 262, above quoted, as follows: "*The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders,*" constitutes the entire claim of the plaintiff in error that the court decided a Federal question raised in the case by the plaintiff, and made such decision against the plaintiff's claim.

It is manifest that no such decision was made.

The language of the Court is only a statement made use of in showing that the boundary lines of the parcel of land claimed by the plaintiff were unsettled.

The statement of the Court is merely a statement of the theory of the plaintiff appearing in the bill of complaint, and in its evidence, viz: That the boundaries or division lines of the parcel of land in controversy were unsettled and required to be fixed, "either by mutual consent, or by determination of a court of equity."

This position of the plaintiff in reference to the boundaries has been stated above in quoting from the complainant's bill of complaint and evidence.

Attention is called to the language of the bill, on page 5 of the Record, in stating what was acquired of the lake bed by the Cleveland Iron Mining Company through the patent of the United States to Burnell, which has been before quoted. The bill says, "that said Burnell and his grantees have acquired no title to

the territory covered by said inland lake, except as acquired on account of their ownership of said lots 2, 3 and 7 of said fractional section 10, and lot 1 of said fractional section 11, so fronting upon said inland lake, and that said frontage ownership on said lake by operation of law, *and not by metes and bounds*, vested in said Burnell and his grantees the riparian ownership of said inland lake opposite said lots 2, 3 and 7 of said fractional section 10, and said lot one (1) of said fractional section 11, to the center of said lake, and a right to the land to the center of said lake, to a common point of ownership *to be equitably determined between all of the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity.*"

Here is the express statement by the bill of the theory of the bill, that the parties did not, by the patents under which they derived title to the shores of the lake, acquire *any specific piece of land in the lake bed which could be measured by metes and bounds* but that as riparian owners they had a right to land to the center of the lake which was to be determined equitably between all the abutting owners, *either by their mutual consent, or by the determination of a court of equity.*

The language of the opinion which is complained of is intended by the Court as a statement of the theory of the complainant, and the language follows the language of the bill of complaint itself upon that subject.

It is manifestly true, as stated by the Court, that upon the plaintiff's theory until such agreement was made, or a decree of the court of equity rendered, defining the boundaries, the complainant owned no specific piece of land *which could be measured by metes and bounds.*

In other words a piece of land whose boundaries

must be fixed by an agreement of the parties, or by a decree of the court, cannot be measured by metes and bounds before such agreement or decree is made.

Instead of the court deciding that the complainant had no title to that part of the lake bed north of the section line, the Court assumed that it had such title before the agreement of March 17th, 1892, was made. It is thoroughly settled by numerous decisions in Michigan.

First: that riparian owners on the border of streams or lakes own the submerged land in fee, to the center or middle line, of the stream or lake, as appurtenant to the riparian ownership.

Second: That parties may be estopped, by conduct, to repudiate a voluntary settlement of boundary lines they have made, though not evidenced by deed.

It ought not to be supposed that the Supreme Court of Michigan, by their decision in this case, intended to overthrow or disregard those rules, so long settled by their own decisions, unless such intent clearly appears from their opinion.

Both rules have long stood unquestioned, as the law of the state. It was not necessary, as assumed by plaintiff's counsel, to repudiate the first proposition, in order to sustain an estoppel as to boundary lines agreed upon.

The plaintiff, in its bill, claimed title to the center of the lake, to an undefined portion of the lake bed.

The Lake Superior Iron Company, by its answer did not deny that the plaintiff originally owned to the center, but alleged that the parties had made a division among themselves, which the plaintiff is now estopped to deny.

The Cleveland Iron Mining Company, by its answer, does deny that the plaintiff ever had title to any part

of the lake and and embraced in the east half of section ten, and also sets up the voluntary division, and the estoppel.

The court did not either directly, or by implication, decide against the plaintiff's claim, that ~~that~~ it acquired, by its conveyances, title in fee to the submerged land to the center, or middle, of the lake. In making the decision the court planted itself on that doctrine. In speaking of the pumping contract (Record p. 259), and assuming that the plaintiff relied on the decision in *Clute* v. *Fisher* in entering to that contract, the court says: "We find that the parties, in reliance "upon that case, entered into a deliberate contract es- "tablishing their *boundary lines* and determining the "amount of territory *belonging to each*. Complainant "made the contract with knowledge that it *gained ter- "ritory south of the line*, known to be valuable, while "*it surrendered territory north of the line*, not then "known to possess any value".

This statement asserts, and is based upon, the settled rule of law in Michigan, in relation to riparian rights that the *title* of riparian owners extend to the middle of the lake or stream.

Recognizing this title to the full extent claimed, the court decided that the parties, by their deed and acts, had made for themselves a different division. This was in no sense a decision of a Federal question, nor was it in any way founded upon the decision of a Federal question.

It matters not from what source the title was derived. The plaintiff claimed that the entire lake bed was owned in fee by the plaintiff and defendants, as appurtenant to their shore ownership, but that it was necessary that it be apportioned by agreement among the parties, or by the decree of a court of equity. Of

course, conceding such to be the case, the question of apportionment, and fixing the lines of each owner, could not be considered a Federal question.

The court did assume exactly that consideration of things, in fact asserted that such was the case originally, but held that the apportionment had been made, and the boundary lines had been defined, by the parties themselves, that the plaintiff was estopped to deny such settlement, and there was nothing left for the court to do. This was not a Federal question, nor did its decision rest upon the solution of any Federal question.

The Court then proceeds to show that the result of the complainant's contention would be the anullment of the contract and the substitution of another contract in its stead, which the Court declared it could not do, closing this part of the case in this language (R. p. 263):

"The Court must either affirm the contract in toto or wholly set it aside. The foundation of the contract was the settlement of the boundary lines and the division of the territory and apportionment of expense in accordance therewith. The Court cannot set it aside as to the boundary lines and reform or remake it upon an equitable division of the territory. If set aside, the contract is at an end and the lake must be left to fill up if either refuses to enter into a new contract. The L. S. I. Co. has discovered no valuable ore. It is willing to assume risks in the hope of finding ore. Though it has found none, it does not seek to avoid its agreement. To that agreement alone it can be held."

The fact will be borne in mind that all the parties were working and acting under that contract in carrying on their mining operations in the lake bed when this suit was brought, and that the continuance of the

contract in force is necessary to their mining operations in every part of the lake bed.

The attention of the Court is also directed to the fact that the foregoing portion of the opinion of the State Court has been directed not to the question of the title which either the complainant or the defendants acquired to the bed of the lake, but to the question of the division or apportionment between them of the lake bed, and the obstacle to that apportionment arising from the settlement of their boundaries by their contract, and their acts, which constituted an estoppel to the claim of the plaintiff for an apportionment. The entire opinion is based upon the assumption that the title of the parties was as claimed, and that an apportionment might have been made had the contract and their acts not disposed of the controversy.

After rendering the above decision, which was sufficient to dispose of the case on the ground of estoppel, the Court decided these further distinct questions, viz: That the complainant was without equity, and was guilty of laches, both of which questions were sufficient to dispose of the case.

The decisions upon these questions is as follows (R. pp. 263, 264):

"Complainant is entirely without equity. It doubted the correctness of the rule of Clute v. Fisher, and thought that a different rule might sometime prevail. It was then its duty to take steps to test the question before permitting defendants to enter into a contract and explorations involving over $100,000. It should at least have informed the defendants of its claim and given them the opportunity to make a contract with that in view.

"This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact

that the venture proved successful after large expenditure creates no equity for this complainant. The skill energy and money of that company developed a valuable property. It ought in justice to reap the benefit and the complainant ought to be estopped to participate in the benefit unless an unbending rule of law prevents.

Twin Lick Oil Co. v. Marbury, 91 U. S. 592.
Clegg v. Edmondson, 8 DeG. M. & G. 787.

It would not have offered to bear its share of the loss if unsuccessful nor could it have been compelled to.

"Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Every one is presumed to know the law. Therefore, it must be presumed to have known of the law enunciated in Ice Co. v. Ice Co. It had an able attorney who keeps well versed in the decisions of the courts of this State. Yet it waited two years and a half before asserting its claim, and still nine months after obtaining the opinion of its attorney that Clute v. Fisher was no longer the law. It waited until circumstances and conditions have so changed that it is impossible to restore the *status quo*. Decree affirmed with costs."

Seventh—The decision of the Federal question which the plaintiff presents in this court, that the plaintiff acquired title to the part of the lake bed claimed by it through the United States patent, was not necessary to the determination of the case, and therefore if it had been decided against the plaintiff it would not give jurisdiction to this court, to review the judgment.

The question of estoppel of the plaintiff to assert its title to the property in dispute, because of the contract of March 17th, 1892, and of the acts done under and in reliance upon it, did not depend upon the

source or means by which the plaintiff acquired its title, or ownership.

It could make no difference in respect to the validity of the agreement by which the parties undertake to settle the boundaries of their respective ownerships of the bed of the lake, that their title to the lake bed was acquired through a patent of the United States, or through the common law of the state, or through a patent from the state.

It was, therefore, not necessary to decide the Federal question in order to hold, as the State Court did hold, that the plaintiff's agreement estopped it to assert its title to the property in dispute. Neither was the decision of a Federal question necessary to the determination of the case on the grounds that the plaintiff was "entirely without equity", and "was guilty of laches". Those grounds arose from the plaintiff's own acts.

Whether the State Court decided these questions as this Court would have decided them had they been presented to this Court, can not be considered upon this hearing.

The only question here is whether these questions, as they were decided by the State Court. were sufficient to dispose of the case.

Pierce v. Somerset Railway, 171 U. S. at 648, 649.
Enstis v. Bolles, 150 U. S. 361 at 369.
Kennebec v. Portland R. R. 14 Wall. 23.
Klinger v. State of Mississippi, 13 Wall. 257.

In the above case of Pierce v. Somerset Railway a Federal question was raised, but like the present case was disposed of by the State Court on the ground of estoppel.

The opinion of the Court says (p.648): "It is thus "seen that there were two questions determined by the

"state court: One related to the validity of the statutes "passed subsequently to the execution of the mortgage, "the court holding them valid, and that they did not "impair the obligation of the contract contained in "the mortgage. That is a Federal question. The other "related to the defence of estoppel on account of laches "and acquiescence, which is not a Federal question. "Either is sufficient upon which to base and sustain "the judgment of the state court. In such case a writ "of error to the state court cannot be sustained. "*Eustis v. Bolles*, 150 U. S. 361; *Rutland Railroad v. "Central Vermont Railroad*, 159 U. S. 630; *Seneca Na- "tion v. Christy*, 162 U. S. 283.

"A person may by his acts or omission to act waive "a right which he might otherwise have under the "Constitution of the United States as well as under a "statute, and the question whether he has or has not "lost such right by his failure to act, or by his action, "is not a Federal one.

"In the above case of Eustis v. Bolles, 150 U. S. 361, "368, the State Court held that by accepting his divi- "dend under the insolvency proceedings Eustis waived "his legal right to claim that the discharge obtained "under the subsequent laws impaired the obligation "of a contract. This court held that whether that view "of the case was sound or not it was not a Federal "question, and therefore not within the province of "this court to inquire about."

County of Adams v. B. & M. R. R., 112 U. S. 123.
Allen v. So. Pac. R'y. Co., 173 U. S. 479.
Capital Nat'l Bank v. First Nat. Bank, 172 U. S. 425.
Dewey v. City of Des Moines, 173 U. S. 193.

To give this court jurisdiction the claim made under a law of the United States before the State Court must be a real and and not a fictitious claim.

In the case of Hamblin v. Western Land Co., 147 U. S. 531, Mr. Justice Brewer says:

"A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of the state courts. Millinger v. Hartupee, 6 Wall. 258; New Orleans v. Water Works Co., 142 U. S. 79, 87. In the latter case it was said that 'the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay'."

The assertion of a claim of right under the laws of the United States made before the state court without color of foundation would not, it is submitted, entitle a party to a review of the question in this court.

It seems to have been considered in some cases that where a party expressly asserts a claim before a state court, that land submerged under navigable waters were covered by a patent or grant of the United States, constituted such a claim of right under a law of the United States as to entitle the claimant to an appeal to this court in the case of an adverse decision. This was the case in Shively v. Bowlby, 152 U. S. 1; Railroad Co. v. Schurmeir, 7 Wall. 272, and Packer v. Bird, 137 U. S. 661. In each case, however, it was held that the claim was not well founded and could not be sustained; that the question of title of the patentees to the submerged lands depended entirely upon the law of the state as expounded in the courts of the state. In

each case this court affirmed a decision of the state court, upon the ground that the question was governed by state law and that the decision of the state courts on the subject was conclusive.

Again, the doctrine was affirmed in the case of G. R. & I. R. R. Co. v. Butler, 159 U. S. 87. The law of Michigan and the decisions of the Michigan courts were held to govern the question.

In the later case of St. Anthony's Falls Water Power Co. v. Board of Water Commissioners, 168 U. S. 349, this court made an extensive review of the cases and held that it is the well and thoroughly settled doctrine in this state that the question of riparian rights and their extent in such cases is entirely a matter for the decision of the courts of the state.

It would seem that, in the light of these decisions, it can no longer be said that there is any color of ground for the claim set up in this case and that if a review of the decision of the state court on this subject can be had in this court, then "a federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay."

II.

If a Federal question was raised and decided by the Court, it was correctly decided, and the other questions decided are not subject to review by this Court.

It is now claimed by the plaintiff that the patents of the United States, by which its land bordering on section 15 was conveyed to its grantors, conveyed to the

patentees a title to a portion of the bed of Lake Angeline. It is insisted (contrary to the fact as we have shown) that that claim was asserted before the Supreme Court of Michigan and that the decision was adverse to such claim.

As a matter of fact the Michigan Supreme Court did not decide that such title was not vested in the grantors of plaintiff by their patents. It held, or assumed, that the plaintiff had such title in fee and that it might be parceled or divided among the several owners in accordance with the laws of the state, but for the fact that they had parceled and divided it among themselves.

If the Michigan court had decided that the title or right of the several parties in the lake bed was not a legal title but a mere equity; or if the court had held that none of the riparian owners had any title to the land submerged by the waters of the lake, such decision would not, or could not be questioned by this court. It has been thoroughly settled by the decisions of this court, as before stated, that the rights of riparian proprietors depend upon the law of the state as expounded by its courts.

III.

THE CASE WAS CORRECTLY DECIDED BY THE MICHIGAN SUPREME COURT, AND IF THIS COURT HAD JURISDICTION TO REVIEW THE ENTIRE CASE THE DECREE SHOULD BE AFFIRMED.

ESTOPPEL.

The plaintiff is estopped, by conduct as well as by deed, to claim any rights in the lake bed, north of the south line of section ten, except such surface rights as are appurtenant to its ownership of the surface of lot six, purchased from the Lake Superior Iron Company.

So far as dealings between the Lake Superior Iron Company and the plaintiff are concerned, we need not go back of the execution of the pumping contract, except to call attention generally to the fact that the plaintiff in 1886 had openly abandoned its claim to territory lying north of that line, acquiescing in the dictum of the court in *Clute v. Fisher*, by removing all its buildings of any value across the line, and also to the fact that mining operations carried on by the complainant and the Cleveland Iron Mining Company had for some time been carried on with entire reference to the section line as the boundary, which fact was known to the Lake Superior Iron Company; all of which had a tendency to confirm the latter company in the understanding that all claim north of the section line was abandoned prior to the time of making the pumping contract.

It is true as said by counsel, that the primary object of the pumping contract was to drain the lake, for the benefit of the three companies interested. In arriving at the terms of that contract and apportioning the expense, and particularly in providing for the permanent drainage of the lake, the extent of the ownership of the several parties was a material question necessary to be determined. The terms of this contract and the apportionment of the expense would naturally depend largely upon three questions:

1. The particular portions of the lake bed owned by each of the parties.

2. The quantity of water to be removed therefrom, and also the quantity likely to flow into the respective parts in the future.

3. The estimated or supposed relative value of these three portions of the lake bed.

The second and third of these questions depend entirely upon the determination of the first. We cannot conceive of the three parties entering into a contract of this kind without first determining what particular portions of the lake bed each owned.

This had all been practically determined and, tacitly at least, admitted and acted upon long before. In the ordinance which they prepared to be passed by the common council of the city of Ishpeming, they set forth definitely and particularly the portion of the lake bed which each claimed to own. This must have been done for the purpose of showing upon the record that the question of ownership had been definitely settled and determined upon, for it was not necessary to recite it in the ordinance for any other purpose. They caused a petition to be signed by their respective agents, asking the council to pass that ordinance.

It is not claimed that this document, signed by the

agents, would be of itself an authoritative settlement of this question, but the respective companies must be supposed to have known of this petition and to have based their subsequent action upon it. The petition was presented and the ordinance passed on the 16th of March, 1892 (R. p. 198). Immediately afterward the pumping contract was prepared and executed by the Cleveland Iron Mining Company on the 17th of March. It was executed some time later by the Lake Superior Iron Company, as before mentioned, and finally by the plaintiff August 20 and 22 (R. p. 94). That contract contains a direct recognition of the conceded fact that all the iron ore which the plaintiff was entitled to take out of the bed of the lake lay south of the line of section ten.

We have said it was impossible that the plaintiff should have been ignorant of the petition which its agents asked the Ishpeming council to pass, at the time of the execution of this contract several months later. The very fact that by the contract it was conceded that the ore which it was entitled to lay south of the section line, and that the contract was nevertheless executed without question, is conclusive that the plaintiff knew of the basis upon which the contract was made.

The contract was executed by the companies under their corporate seals. It cannot be claimed that this contract was unauthorized, or even that the evidence fails to show that it was authorized. The *plaintiff by its bill* alleges that it and the defendants, within the last five years, have shared the expense of pumping out and draining the lake, stating the proportions contributed by each to the expense. This is alleged as *the act of the plaintiff* as well as the defendants, and must be taken as lawfully authorized. This, as the proof

shows, was done by *virtue of the contract* mentioned. We have here an admission by the bill that this act was duly authorized and was the act of the plaintiff.

Besides, the contract was introduced in evidence *by the plaintiff*. It was introduced in evidence as, what it purported to be, *a contract between the plaintiff and the defendants*, and not a contract between unauthorized agents or officers of the plaintiff and the defendants. It would be strange if a party introducing a contract of this kind could afterwards object that there is no affirmative evidence of the execution of the contract.

In addition to this, as stated, the contract is under the *corporate seals* of the several companies. The seal itself, without the aid of any statute, would be *prima facie* evidence of the authority of the officers using it to execute the instrument and affix the seal. The statute of Michigan, Act 162 of the laws of 1893 (Compiled Laws of Michigan, 1897, vol. 3, sec. 10196) goes further and provides that when such seal is affixed to an instrument purporting to be executed by a corporation, the seal "shall be prima facie evidence of the *due adoption* of said seal and that it was affixed to said instrument by *due authority*, and that said instrument was in fact *lawfully executed* by such corporation." (See foot note.)

Counsel in their brief cite the Michigan statute requiring a three-fifths vote of the stockholders to authorize the *alienation of land* by mining companies,

---

NOTE.—The entire section quoted from is as follows: "(10196) Sec. 1. The People of the State of Michigan, enact, That any corporation, joint stock company, or partnership association, limited, may have a common seal which it may alter at pleasure, and that such seal affixed to any instrument purporting to be executed by any such corporation, joint stock company or partnership association, limited, foreign or domestic, shall be prima facie proof of the due adoption of said seal, and that it was affixed to said instrument by due authority, and that said instrument was in fact lawfully executed by such corporation, joint stock company or partnership association, limited."

and insist that there is no proof that such authority was given in this case.

It is also asserted that the proof of such authority can only be given in a certain way.

The Michigan statute provides that a person may, by procuring and recording certain proofs, perpetuate evidence of the facts upon which the validity of a conveyance of real estate by the corporation depends. There is nothing, however, in the statute, which excludes any other competent proof, and the statute of Michigan passed since the act restricting the power of corporations to alienate real estate, provides that the corporate seal shall be evidence of due authority. The instrument was produced in evidence by the plaintiff, bearing its corporate seal. By the terms of the statute the seal was prima facie evidence of its adoption by the company and that the instrument was lawfully executed. Besides, the plaintiff's witness testified that this was the contract of the company, and this was admitted by defendants' counsel; and upon such testimony and admission the contract was offered in evidence by the plaintiff (Record p. 88.)

No attempt was made to rebut the presumption so raised, and therefore the authority of the officers to execute the instrument is conclusively established.

Up to the time of the making of this contract, according to nearly all the testimony, the Pittsburgh and Lake Angeline Iron Company had never claimed anything north of the section line, and the Cleveland Iron Mining Company and the Lake Superior Iron Company claimed nothing south of that line. No question had ever been raised between the parties as to the boundary line, or any doubt raised over the correctness of the line so assumed, so far as appears by any evidence, except the testimony of Mr. Kidder as to

one interview between himself and the superintendent of the Cleveland Iron Mining Company, in which he was asked to recommend his company to quit-claim all interest in the bed of the lake north of the line and take a quit claim from the Cleveland Iron Mining Company of all interest south of the line, which he says he emphatically refused to do (R. p. 109). This was some years before the question of joint action in pumping out the lake was raised. If this testimony of Mr. Kidder has any bearing at all, and is found to be correct, it shows that there was some question or doubt as to the rights of the parties, although they acted entirely upon the supposition that the section line was the accurate dividing line.

The fact, if it was a fact, that the parties were not entirely agreed as to their rights in that respect strengthens our position that the pumping contract constituted a final settlement of all such questions. It shows that if the Pittsburgh and Lake Angeline Iron Company prior to that time had some lingering idea of making claim to some portion of the bed of the lake north of the section line, it was entirely waived, given up, and all questions relating to it settled by the execution of this contract.

The Pittsburgh and Lake Angeline Iron Company was particularly anxious to have the lake drained, and proposed, if no other arrangement could be made whereby the expense should be shared between the parties upon some agreed basis, to build a cofferdam along the section line and pump out the water from its portion of the the lake, lying south of the line, for its own benefit. Some negotiation and discussion occurred on the subject of apportioning the expense. The area of the lake bed claimed by the plaintiff was comparatively small, and the amount of water to be

removed from that portion of the lake was much less than its proportion of the area, for the reason that the water there was shallow. It had no particular interest, as it claimed, in keeping out the water and mud from the deeper parts of the lake, because they were not interested in the lake bed at those points.

The justice of the position taken by the complainant was recognized, and its share of the expense of pumping was fixed on that basis. While the Lake Superior Iron Company was to pay four-fifteenths of the original cost, the complainant was to pay but three-fifteenths.

Of the expense of removing the thin mud that had settled in the central part of the lake, the complainant declined to pay the proportion it had agreed to pay of the cost of drainage, for the reasons above mentioned.

It cannot be supposed that this contract, requiring the defendants to pay so large a proportion of the original expense of draining, and to pay the entire expense of permanent drainage of the main body of the lake, would have been entered into if the complainant at that time had asserted ownership in all that portion of the lake bed it now claims.

The Lake Superior Iron Company would not have agreed to pay a larger proportion of the pumping contract, than was to be paid by the plaintiff if the plaintiff had at the time insisted that it was the owner of 29.43 per cent of the lake bed, to an ownership of 24.36 per cent by the Lake Superior Iron Company (Record p. 41).

Neither would it have assumed to share with the Cleveland Iron Mining Company the entire expense of permanent drainage of the central part of the lake if the complainant had asserted that it was the owner of a considerable portion of the lake bed extending to the center.

Let us refer again to the provisions of the contract. (Record p. 88).

It recites that the three parties *severally* own all the lands surrounding Lake Angeline (there is no claim of joint ownership or ownership in common requiring a partition); that iron ore has been discovered under the bed of the lake, and that it has become necessary to pump out the water of the lake and *permanently* drain *thereafter* the bed thereof, in order that each of the parties may economically mine such ore as lies under such portions of the bed of the lake as *each* of the parties is *respectively* entitled to. This recital shows that each of the parties owns a *distinct* portion of the lake bed and that that portion is *well defined*, that is to say, fixed and determined by the agreement of the parties, and evidenced by the contract itself.

The cost of pumping under the contract is stated, and the contract definitely apportions the amount to be paid by each company. No difficulty or doubt is suggested as to such portion. The contract, however, recites that it is necessary to proceed at once with the work in order to get the pumping done for the price named, and that the cost of the continuous drainage of the bed of the lake, after the water is once pumped out, is impossible of ascertainment, and the parties are desirous of fixing the *proper proportion* of the expense of such continuous drainage, as well as of the purchase of apparatus for pumping the water in the first place.

In consideration of the premises and of the mutual promises of each, the several parties agree as to the proportions of the contract price they are to pay respectively.

The Cleveland Iron Mining Company agrees, after the lake is pumped out, to maintain and operate the plant, to keep the lake permanently drained, advancing

all the necessary funds to carry on the work and keep the apparatus in repair, and the expense is to be apportioned between it and the Lake Superior Iron Company, the Pittsburgh and Lake Angeline Iron Company being relieved entirely from any part of that expense.

The Lake Superior Iron Company agrees on its part to pay its proportion, as so fixed, of the cost of pumping, also the cost of permanent drainage, and of the purchase of additional apparatus for that purpose.

The Cleveland Iron Mining Company and the Lake Superior Iron Company, it will be seen, agree with the Pittsburgh and Lake Angeline Iron Company to keep the lake permanently drained, and they cannot relieve themselves of that obligation so long as the latter company shall desire the drainage to continue.

The plaintiff agrees merely to maintain a flume to "divert and carry away all the surface water, or other surface drainage, which would come into the present bed of said lake from all the land lying above the present water level of said lake and south of the south line of section ten as projected through said lake; and also to run into said flume any and all water which the said third party may pump from its mine or mines;" it agrees to maintain said flume and keep it in repair and in successful operation "until the iron ore to which said third party is entitled, *lying on, in or under the portion of the bed of said lake lying south of the south line of said section is mined and exhausted*," after which it is not required to incur any expense whatever towards the drainage of any part of the lake or keeping the water out, but merely to turn over the flume to the defendants and allow them to operate it at their own expense.

Here is not only an express admission that the ore which the plaintiff is entitled to lies south of the

section line, but an express exemption of the plaintiff from liability for any share of the expense in *draining any other part of the lake bed.* If the claim of the plaintiff can be maintained and the contract remain in force, the plaintiff may, after having exhausted the ore in the lake bed south of the section line, turn over the flume to the defendants to operate at their own expense, and still insist on the defendants continuing the drainage of the lake bed, while it is engaged, perhaps for a long term of years, in mining out the iron *ore north of the line*, and without contributing anything itself to that expense, and that, too, even though the defendants long before that time may have exhausted the iron ore lying under their portions of the lake so as to have no further interest in keeping the lake drained. Such a result cannot have been contemplated by the parties.

The apportionment which has been made of the expense of pumping and keeping the water out is based upon the apportionment of the bed of the lake which was made by the parties, and such apportionment is as much a part of the contract as the apportionment of the expense of pumping and draining. It is impossible to set aside those provisions of the contract which define the portions of the lake bed to which each party is entitled without abrogating the entire contract for keeping the lake pumped. The latter cannot stand without the former.

It is urged by the plaintiff that, as the apportionment of the lake bed was entered into by it in ignorance of its legal rights, that portion of the contract should be disregarded.

Its bill is not framed upon any allegation that the contract was entered into by mistake and ought to be set aside. The plaintiff is not seeking any such

result, first, because it has not made any case in its bill for such relief; and second, it proceeds upon the theory that the contract, so far as the pumping is concerned, is still in force. It merely asks the court to disregard that portion of the contract which relates to the division of the lake bed, leaving the other portions of the contract, which were founded upon that division, in full force. It asks the court to reapportion the lake bed between the parties, leaving the contract for the perpetual drainage of the lake at the expense of the defendants, in force. The inequity and absurdity of such a result is too apparent upon the face of it to require argument.

The plaintiff's counsel, on the hearing in the State Court, conceded that the expense of pumping ought to be re-adjusted, and virtually asked to have the contract set aside as to that expense, and re-formed (see opinion of State Supreme Court, Record p. 262, bottom).

But the bill is not framed with a view of re-forming the contract. If it were, such relief, under the evidence in this case could not be granted.

It is a well settled principle that a court cannot make a contract for parties. It can correct a contract so as to make it what the parties mutually intended it to be, but no court has ever undertaken, on ascertaining that a contract was made as the parties intended it to be, under a mistake of the facts, to reform it and make it what the parties probably would have made it if they had correctly understood the facts. As we have before stated, the area of the respective holdings in the lake bed alone would be no guide to the proper apportionment of the expense of pumping. Other considerations combine to affect the result, and the court cannot find from the evidence produced, or even evidence that can be produced, the

exact effect those considerations had in arriving at the result.

But, suppose that the plaintiff was before the court with a bill stating the facts as it claims them to exist, asking the court to set aside the entire contract on the ground of mistake, and offering to restore, so far as it could, all that plaintiff had taken under the contract and to place all parties in *statu quo*. What would then be the condition of the parties?

First. It would be necessary to restore the iron ore it had taken from that part of the lake bed which confessedly belongs to the Cleveland Iron Mining Company. Even if the payment of the value would answer the purpose, it is not susceptible of accurate ascertainment.

Second. It is impossible for the plaintiff to put the parties in *statu quo* with respect to the expenses of exploring which they have incurred. The cost might, perhaps, be approximately estimated, but no reimbursement of the cost of exploration would now answer. Those expenses were incurred without any secured beneficial results. The defendants assumed all the risk of such expenditure and assumed the risk upon the well understood and clearly expressed understanding and agreement of the parties concerning their respective shares of the lake bed. If the explorations had been unsuccessful and developed no value, there is no way in which the plaintiff could have been required to pay the expense, or any part thereof. There is no rule of equity which will allow one to wait until the expense has been incurred, and the risk and the enterprise has proved successful, and then claim the benefit of the enterprise by sharing the expenses, without having assumed any part of the risk.

Twin Lick Oil Co. v. Marbury, 91 U. S. 592.

Third. All agreement for the permanent drainage of the lake would have to be wiped out. The immense expenditure that has been made by all the parties to open mines in the lake bed, in reliance upon this permanent continuous pumping contract, must be lost, and the mines destroyed, unless the parties can agree upon a new arrangement for the continuous drainage of the lake. The court is powerless to make such new agreement for the parties. Not only is either of the three parties at liberty to refuse to contribute any part of the expense of such pumping, but any one of them is at liberty to refuse to allow the pumping to go on. With the contract entirely abrogated, either party has a right to the water and to demand that the pumping stop and the lake be allowed to fill.

It follows, therefore, not only that the plaintiff is not offering to restore the parties to their original condition, but that it is absolutely impossible so to restore them.

After the execution of the pumping contract, the division of the lake bed, as agreed upon by it, was acted upon and recognized by all the parties continuously, at least down to September, 1896. These acts of the local agents and superintendents are shown, not because the agents could by their acts alone affect the title to the property of their companies, but their acts in the prosecution of the business of their companies, and in pursuance of their authority, are referable to the contract. It must be assumed that their authority extends to the carrying on of the mining business upon the property owned by their respective companies. In carrying on such mining business, and observing the lines fixed by this contract, they were within the sphere of their authority carrying out the contract made by the companies themselves. In so doing the

defendants, relying on the contract, have placed themselves, in a position whereby, if the contract is now to be set aside, in whole or in part, they must suffer great and irreparable loss, and loss which cannot in any way be compensated.

As we have said, the establishment of the boundary lines between the lands of the respective parties was necessarily involved in the pumping contract, and was as much a part of it as if it had been fully expressed therein. On the strength of it the defendants entered into and executed the contract, and proceeded to explore and develop the mines under their respective portions of the lake bed, as so established.

It is not a case where parties have merely established their boundaries under a mistaken view of their rights, and where, after one of the parties finds that he has acted under a mistake, seeks to be relieved from the results of such mistake.

In reliance on the understanding by which the lines were established the defendants have entered into a contract whereby they are bound, so long as either party shall require it, to keep the water out of the lake bed at their own expense. They have fully performed the contract, so far as the removal of the water is concerned, and have for several years kept up the permanent drainage. Not only that, but, in reliance on the same arrangement they have developed mines under the lake bed, which are worthless unless their value can be preserved by the continuous and permanent drainage to be kept up under this same contract. The Lake Superior Iron Company has not only expended money in sinking drill holes for the purpose of exploration in the now disputed territory, but has opened and developed a body of ore, at great expense, mostly on its undisputed territory under the lake bed, in reliance on

the continuance of the drainage under this contract (Record pp. 136 to 142, 147). If the contract is set aside by reason of the alleged mistake, this mine becomes worthless, unless the parties can arrive at another agreement—first to permit the permanent drainage of the lake, and second to make an equitable apportionment of the expense.

But a party seeking to be relieved from a contract on the ground of fraud or mistake must act promptly, and before the conditions have changed so that a rescission will work serious injury to the other party.

Disbrow v. Jones, Har. Ch. 102.
Street v. Dow, Ibid. 427.
Carroll v. Rice, Walk. Ch. 373 at 378.
DeArmund v. Phillips, Ib. 186 at 198.
Campau v. VanDyke, 15 Mich. 371-377 et seq.
Russell v. Miller, 26 Mich. 1.
Harlow v. L. S. Iron Co., 41 Mich. 583-589, and cases cited at p. 589.

The complainant, by inducing the defendants to expend these large sums of money, not only for drainage, but for explorations and development, in reliance on the agreement, and that upon the understanding that the boundary lines had been established, and that the plaintiff would claim nothing beyond such lines, is estopped to deny the right of the defendants to remove the ore from their portions of the lake as so determined.

Dickinson v. Colgrove, 100 U. S. 578 at 580.
Kirk v. Hamilton, 102 U. S. 68 at 76 to 79.
Maxwell v. Bay City Bridge Co., 41 Mich. 453, at 466 and 467.
Cleland v. Casgrain, 92 Mich. 139 at 153.
McVicker v. Filer, 31 Mich. 304 at 308.
State v. F. & P. M. R. R. Co., 89 Mich. 481 at 487.
2 Herman on Estoppel, Secs. 932 to 936, and 954.

It is not necessary to our defense that the legal title to the bed of the lake passed to the defendants by the

acts which constitute an estoppel, so that the title could not now be asserted by the complainant in an action of ejectment, or other action at law, as in the cases of Wood v. Railroad Co., 90 Mich. 34, and Hayes v. Livingston, 34 Mich. 384.

The question here arises upon a *bill in equity*, filed by the plaintiff for the purpose of obtaining a decree setting off to it those portions of the lake bed which it has surrendered, both by deed and by a long course of conduct, and thus to avail itself of the benefits of the explorations and developments which have been made by the defendants, upon the understanding with the plaintiff that they were made upon lands to which the plaintiff made no claim of title.

Under the decision in the case of Clute v. Fisher the plaintiff may have understood that its ownership in the bed of Lake Angeline was confined within the lines of section fifteen (15), extended across the lake, and, acting on that understanding, entered into the pumping contract, and acted under it for several years, giving the defendants to understand that it made no claim beyond those lines, and so encouraged them to expend money in the drainage of the lake and in making explorations in the lake bed for iron ore, but the plaintiff had the right to question that decision—to decline to act upon it, as not expressing the law of the land, as was done in the case of Grand Rapids Ice and Coal Co., 102 Mich. 227.

The plaintiff, for the purpose of closing a contract which it greatly desired, and which would be highly beneficial to it, without incurring the expense and delay of a contest over the question, chose to assent to the rule as announced in Clute v. Fisher, and to act upon it as defining the limit of its rights, closed the contract, proceeded at once to realize

the benefits of it, and allowed the defendants to make the large expenditures shown by the record, upon the understanding that all the ores discovered north of the section line would belong to the defendants.

For the plaintiff to change its position now, after all this expenditure has been made, and the ore discovered, and to appropriate the fruits of such expenditure, and of such exploration and discovery, and deprive the defendants of the benefits thereof, would be to work a fraud upon the defendants which a court of equity will not help to accomplish.

A party will not be permitted to recover lands which he had encouraged another to occupy and improve, even where the encouragement was given under the influence of a mistake and in ignorance of his own better right.

2 Herman on Estoppel, Sec. 954, and cases cited in note 4.

It has been insisted that the doctrine of estoppel as claimed by us has been repudiated by the Michigan Supreme Court, and the leading case of *Hayes v. Livingstone*, 34 Mich. 384, has been cited to support that claim.

That was an action of ejectment and depended solely on the legal title. Mr. Justice Cooley, in reviewing the cases which were relied on to support the estoppel, on page 390, cites a number of cases which he says do not apply, because they were "either cases in equity or cases in which, under permission of the statute, an equitable defense was relied upon." After citing the cases, he says: "These cases have no necessary bearing, *and their correctness may be conceded.*"

Let us see what those cases, whose "correctness may be conceded," hold.

In the case of *Wendell v. Van Rensselaer*, 1 Johnson

Ch. 344, it was held that a party, by concealing his title to real estate might be estopped to set up such title against a person who purchased the same with his knowledge, and the court says (p. 354): "There is no better principle established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person".

In the case of *Storrs v. Barker*, (6 Johnson's Ch. 166), a bill was filed to restrain the defendant from prosecuting an action of ejectment. The defendant had purchased from the legatee of a married woman, who, under the law of the state at that time, was not competent to make such devise. The plaintiff in the ejectment suit was the father of the testator and claimed as her heir, although he had advised the complainant to make the improvements and exercise acts of ownership upon the land for a few years before he set up his claim, he, in the meantime, being ignorant that his daughter's will was void. It was held to be the rule of equity "that where one, having title, acquiesces, knowingly and freely, in the disposition of his property, for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by that disposition of the property, and especially if he encouraged the parties to deal with each other in such sale and purchase."

It was further held by the court that his ignorance of the law did not interfere with the operation of the rule, and the court, after discussion of the question,

concludes (p. 170): "It would seem, therefore, to be a wise principle of policy that ignorance of the law with knowledge of the fact cannot generally be set up as a defense; and it appears to be settled by a course of equity decisions, that ignorance of one's legal right does not take the case out of the rule, when the circumstances would otherwise create an equitable bar to the legal title."

In the case of *Tilton v. Nelson*, 27 Barb. 595, which was an action under the code by which the court had jurisdiction of equitable defenses, the court held that a party having the legal title might estop himself by a course of conduct from setting up a legal title. In that case also the party estopped claimed to have been acting under a mistake of law, and it was held that his ignorance of his rights would not interfere with the estoppel. It was said by the court (p. 605): "When a party procures, or even acquiesces in, the disposition of his property by another under color of title, and pretending to title, he shall be bound by such disposition, and shall be presumed to know the law so far as it is applicable to the case."

In the case of *Snodgrass v. Ricketts*, 13 Cal. 359, a party was held estopped by conduct to set up a title to real estate. The doctrine is stated by the court as follows (p. 363): "If one man makes a bargain with another for land, the latter claiming the title and the right to sell it, and this is done in the presence and at the instigation of a third party who has the title, is not the third party estopped from setting up the title as against the purchaser? We think he is and that all persons in privity with such third person are likewise estopped unless they are purchasers for valuable consideration without notice."

In the case of *Fay v. Valentine*, 12 Pickering 40, a

bill was filed to redeem mortgaged premises. The defendant had purchased from a prior mortgagee after condition was broken, and before purchasing the plaintiff had declared to him that he never would redeem the land because it was not worth more than the amount for which it was mortgaged. To the claim on the part of the defendant that he was estopped from insisting upon his right to redeem, it was urged that the interest of the mortgagee can never be transferred or relinquished by parole. To that claim the court says (p. 44): "Most certainly it cannot, but no party, whatever may be his interests or legal rights, can have relief in a court of equity unless his claim is founded on the basis of good faith and justice. It is a familiar rule that he who seeks equity must do equity. He must not expect the aid of a court of equity to sanction the violation of his engagements although there may be no legal means to enforce them, nor will he be allowed to profit by the mistakes of another, caused by his own misrepresentations or concealment, nor can he be allowed to set up the statute of frauds for the purpose of protecting fraud."

In the case of *Foster v. Bigelow*, 24 Iowa 379, the same doctrine is held and is stated as follows: "Plaintiff's silence as to his title, his acquiescence in the possession of the defendants, and his passive permission of the improvements, will, in equity, estop him from setting up the title he has so long failed to assert, if, indeed, he has not purposely concealed it."

It will be seen that, in expressly recognizing the correctness of these cases, the court, in the case of *Hayes v. Livingston*, did not deny, but rather affirmed, the right of a court of equity to apply the doctrine of equitable estoppel, even to assert title to real estate.

But this is a case relating to *boundaries*, rather than title. The *title* of the respective parties to the lots conveyed to them respectively constituting the border of the lake, has never been disputed. The only question that ever required adjustment was the *boundaries* of those lots, including the portions of the lake bed appurtenant to them. Those boundaries were settled by the contract, understanding, and course of conduct of the parties. In the case of *Hayes v. Livingston* (34 Mich. 390), Mr. Justice Cooley cites the following cases in which the doctrine of estoppel was applied to a voluntary adjustment of boundaries between contiguous estates:

Robinson v. Justice, 2 Penn. 19,
Speller v. Scribner, 36 Vt. 245.
Halloran v. Whitcomb, 43 Vt. 306.
Merriweather v. Larmon, 3 Sneed 447.
Spears v. Walker, 1 Head. 166.
McAfferty v. Conover, 7 Ohio St. 99.
Gove v. White, 23 Wis. 282.

He then adds: "The principle of these cases has been approved in this state," citing:

Reed v. Drake, 29 Mich. 222.
Stewart v. Carleton, 31 Mich. 270.

To which we will add:

Smith v. Hamilton, 20 Mich. 443.
Joyce v. Williams, 26 Mich. 332.
Cronin v. Gore, 38 Mich. 381.
Diehl v. Zanger, 39 Mich. 601.
Dupont v. Starring, 42 Mich. 492.
Burns v. Martin, 45 Mich. 22.

See also:

Brown v. Wheeler, 17 Conn. 345 at 352 et seq.
Kinney v. Farnsworth, Ibid, 360-361.

The complainant is estopped also on the ground that a license was given by it to the defendants to explore for ore for the purpose of discovering and removing

the ore, and upon such license a large expenditure has been made, by means of which ore has been discovered. The license is not revocable after such expenditure and discovery of ore has been made.

Marble v. Whitney, 28 N.Y. 297 at 307.
Western Union Tel. Co. v. Bullard, 67 Vt. 272.
National Water Works Co. v. Kansas City, 65 Fed Rep. 691, at 694 and 695.
Norfolk & W. R'y Co. v. Purdue, 40 W.Va. 442.
Southern Marble Co. v. Darnell, 94 Ga. 231.
McBroom v. Thompson, 25 Or. 559.
Clark v. Glidden, 60 Vt. 702.
Morton Brewing Co. v. Morton, 47 N. J. Eq., 158, at 162 et seq.
Nowlin v. Whipple, 120 Ind. 596.
Saucer v. Kellar, 129 Ind. 475.

Some cases are cited which are supposed by complainant's counsel to settle the doctrine in relation to estoppel contrary to what we have claimed. The only cases that we think require notice are the following:

De Mill v. Moffat, 49 Mich. 126.

This was an action of ejectment. Plaintiffs claimed as heirs of John Thorn, deceased. Defendant claimed under a deed from Thorn to one Hamilton, which was lost, and evidence was given of its execution, and the verdict was based on proof of such deed. Plaintiffs claimed an estoppel because Hamilton, while administrator of Thorn's estate, had sometimes described the property as belonging to the estate. There was no evidence that the situation of the plaintiffs had been in any way affected by his having referred to the lots as belonging to the estate. It was therefore said that there was no case made even for an equitable estoppel, and even if an equitable estoppel had been shown, under the authority of *Hayes v. Livingston* it would not be a defense in an action of law.

Nims v. Sherman, 43 Mich. 45.

This was a case of summary proceedings to obtain possession. Plaintiff claimed under a foreclosure sale, which was ineffectual because the holder of the title was not made a party. The defendant claimed under a deed from the owner of the legal title. Plaintiff claimed an estoppel against the defendant because, before he bought, defendant had told him he was going to leave the land after he had harvested his wheat and that he made no claim under the deed. The case showed that the expressed intention of the defendant to leave the land depended on certain conditions, and that there was not enough to raise an equitable estoppel, and certainly not enough to transfer the legal title under which alone the plaintiff could recover in that case.

First National Bank of Kalamazoo v. McAllister, 46 Mich. 398.

This was a suit in equity in aid of execution. McAllister bought a lot and took conveyance to himself. Afterwards, wishing to transfer it to his wife, he took another deed from the grantor directly to his wife without reconveying. Here the legal title was certainly in McAllister, but this being a suit in equity it was held that there was no equity in favor of the complainant and that the court would regard the title as having passed to Mrs. McAllister. McAllister by his act had placed himself in a position where he was estopped in equity from claiming the title, and his creditors could claim no more rights in that respect than he could. This was certainly a case where a court of equity recognized the transfer of a title by estoppel.

Shaw v. Chambers, 48 Mich. 355.

Chambers brought ejectment and Shaw filed a bill

to enjoin the prosecution of the suit, alleging an estoppel because the plaintiff in ejectment had told him before he bought that he and his co-heirs had found they could not hold the property. He was only one of a large number of heirs. After this he bought the interests of all others. Complainant by his bill showed a complete legal title and it was held he had a good defense in the ejectment suit and there were no grounds for equitable jurisdiction. Defendant, however, claimed, if he should not be able to make a good title at law, he ought to be relieved on account of the equitable estoppel and a court of equity had jurisdiction for that purpose. The court says (p. 359): "To this suggestion it is answered that estoppel in pais cannot be admitted to overthrow a title to land (citing cases). This is true as a general rule; spoken words cannot be received as a substitute for the formal conveyance which the statute of frauds requires. Cases of doubtful and disputed claims, and cases where the facts are not of record and not readily accessible, may present exceptions. *Brant v. Virginia Coal Co.*, 93 U. S. 326. But one fatal objection to the supposed estoppel is as good as many, and in this case it is enough to say it fails on the evidence. Jones does not pretend to have sought information from any brother or sister of Enoch N. Chambers except the defendant, and as a man of sense he must have known that what one of several supposed heirs might say could bind the interest of nobody but himself. But defendant denies the statements imputed to him; and we have word against word, with quite as much circumstantial support for the denial as for the assertion. The supposed estoppel may therefore be dismissed from consideration."

In this case the court expressly recognize that there are cases where spoken words will operate as an estop-

pel in equity, but that no case for estoppel is made by the evidence and therefore the question is not decided, but dismissed from consideration.

John Hancock Insurance Co. v. Dick, 72 N. W. Rep. 179.

This was a bill filed to cancel an insurance policy and in this case as well as the cases cited, the only question discussed were whether equity had jurisdiction, or whether there was an adequate remedy at law.

Brewer v. Boston & Winchester R. R. Co., 5 Metcalf 479.

It was said by the court in this case that it did not appear that the declarations of the demandant were made to tenant's agent with a view to influence their conduct, or that he had knowledge of their intention to purchase. This case, as well as that of *Proctor v. Putnam Machine Co.*, referred to therein, was an action at law, and the decision of the court was made with reference to the legal title.

Brant v. Virginia Coal and Iron Co., 93 U. S. 326.

In this case there were no representations that the title was other than what it actually was. There were no facts on which an estoppel could possibly be predicated. In discussing the question of estoppel generally Mr. Justice Field, in relation to the question of fraud, says (p. 336): "The element of fraud is essential either in the intention of the party estopped *or in the effect of the evidence which he attempts to set up.*" And further: "There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct in which the presence of fraud, actual or constructive, is wanting; as where one of two innocent parties must suffer from

the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the profits of a transaction he is not permitted to deny its validity while retaining its benefits."

Here we have exactly the case supposed. The complainant, rather than question the correctness of *Clute v. Fisher*, and incur the expense and delay of such action, and for the purpose of inducing the defendants to join in the drainage of the lake, which it greatly desired, agreed to the boundary lines, obtained the desired action of the defendants and now, while retaining the benefits, seeks to deny the validity of the arrangement. The fraud consists "in the effect of the evidence" it now "attempts to set up".

Ignorance of title does not necessarily relieve a party from the consequences of his acts and representations.

1 Story, Eq. Juris., Secs. 387 and 388.
Henshaw v. Bissell, 18 Wall. 271.

In this case it is said by the court: "There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights."

See Pomeroy, Eq. Juris., Secs. 803, 804.

In the case of *Boardman v. Ry. Co.*, 84 N. Y. 182, the court, Miller, J. after quoting the rule as stated by Lord Denman in *Pickard v. Sears*, cited by plaintiff's counsel, says: "Nor is it essential to an equitable estoppel that the party should design to mislead and it is sufficient if his acts were calculated to mislead and have misled another acting under them in good faith and exercising reasonable care."

It is urged in the state court, that the defendants knew, or had as good opportunities to know, the facts, the state of the title, and the respective rights of the

parties, as the plaintiff, and that therefore they could not have been misled by any representations on the part of the plaintiff.

The defendants undoubtedly were bound to know the law of riparian proprietorship to the same extent as the plaintiff. It was a matter upon which, according to the plaintiff's testimony, there had been some question raised. The case of the rule announced in *Clute v. Fisher* was supposed by some to be the law, and by others not. The time came when it was necessary to resolve all doubts on that question and determine what should be regarded as the boundary line as between these parties. The representations upon which the defendants relied, being made by the statement of the title set forth in the Ishpeming city ordinance, and also practically in the contract itself, and by the acts and conduct of the plaintiff, both before and since, and upon which they made these large expenditures of money, were not representations as to the facts, or the rights of the parties, but representations that the plaintiff *abandoned all claim to any part of the bed of the lake north of the section line.* The vital question at that time, and that on which the defendants acted, was not what, after a contest, would the courts decide as to the rights of the parties, but *what did the parties now agree* were their rights, and what claim of rights did the plaintiff agree to abandon, or represent that it did abandon?

Doubtless the acts, agreements and representations of the plaintiff in that regard were made in good faith, without any expectation of ever changing its attitude on that subject. There was no fraud in making the representations and the agreement; but to allow the plaintiff now, after all that has been done under the arrangement, the representations, and the acts, upon

which the defendants relied, to repudiate that contract, would result in an unconscionable fraud upon the defendants.

Plaintiff's counsel, on page 59 of their brief, urge that the plaintiff acquiesced in the rule of *Clute v. Fisher* under compulsion, and could not be estopped thereby. They assert, in effect, that the rule there announced was the *law of the state*, until it was changed in 1896, and that the plaintiff, as a law-abiding citizen could not do otherwise than conform its conduct to it.

If this was so, then the settlement made by the parties was exactly in accordance with their legal rights at the time. The change of the law could not affect rights already vested.

But of course the dictum in *Clute v. Fisher* never was the law in Michigan.

The plaintiff might have asserted its rights in the lake bed to the center, or middle line, and appealed to the courts in support of them, if it had seen fit. Instead, it considered it more advantageous to have an immediate settlement and determination of its boundaries, so as to secure the valuable ore deposits it had found, and to enable it to work them without the delay attending litigation. After having obtained the benefits of the speedy settlement, it cannot now claim a re-adjustment of the boundary lines.

IV.

If the parties had not already apportioned the lake bed among themselves, and established their boundaries, the court, if it had jurisdiction to make such apportionment, could not do so by lines converging to a common center but must make such division by lines running to the middle line or thread of the lake.

That riparian owners in Michigan, whose land is bounded by a stream own to the middle line of the river, is thoroughly settled by the decisions of the courts of that state.

> Webber v. Boom Co., 62 Mich. 626, at 636 and cases there cited.

It is also well settled that irregularities in the banks of the river do not interfere with the rule. If the river is straight and of uniform width, the middle line will be parallel with the banks, and the lines of proprietorship will extend into the stream at right angles with the banks as well as with the middle line. If there are bends, bays or other irregularities in the river the lines will vary from a right angle with the banks, but will nevertheless be drawn at right angles with the midle line.

In *Clark v. Campau*, 19 Mich. 328, the rule is stated as follows: "Where the stream is straight, the water front will be bounded by lines drawn at right angles with the thread of the stream, protracted until they reach the end of the shore line. When the stream curves, the same principle applies, and the lines running from the shore would converge or separate, according as the land lay within or without the curve."

In *Bay City Gas Light Co. v. Industrial Works*, 28

Mich. 182, the question is more fully discussed, and the rule of *Clark v. Campau* is affirmed. "Any other rule" says the court (p. 183), "would subject riparian owners to have their entire access to the stream, and all their docking privileges cut off, whenever the local curve of the shore should be such that a line drawn at right angles with their neighbor's shore line would cross in front of them—a result which would be inevitable where the shore is not altogether straight and parallel with the middle of the stream. * * * If the bounds are all to be governed by lines drawn at right angles from the thread to the shore *termini*, as near an approach will be made to an unvarying measurement as is possible under any ordinary circumstances." And it is further said that "*no other rule* has ever been suggested which will give every proprietor his title to the thread of the stream; and as held in *Clark v. Campau*, we regard this rule as *settled* and reasonable" (page 185).

A different rule is suggested on behalf of the plaintiff in this case, and it needs but a glance at the map to show that the lines under the proposed rule, if adopted, would have precisely the effect above stated and "subject riparian owners to have their entire access to the stream cut off."

In the New England states, in Illinois, Wisconsin, Iowa and some other states, the law is held to be that riparian ownership on the shores of inland lakes stops at the water's edge. In New York, New Jersey, Ohio, Michigan, Minnesota, Kentucky, and some other states the law is held to be, as above stated, that riparian ownership on the shore of non-navigable lakes extends to the middle line of the lake.

There is little or no diversity in regard to riparian ownership as applied to rivers, and especially as to non-

navigable rivers, that the ownership extends to the middle thread of the stream.

In those states in which the rule is extended and made applicable to non-navigable lakes, the authorities place it upon the ground that there is no difference in principle between the case of rivers and lakes, and that the rule which is applied to one applies also to the other; that is to say, *that the rule which has been made applicable to rivers should be and is made applicable to lakes.*

The distinct principle is that ownership of the shore carries ownership to the *middle line* of the water in front of the shore.

The distinction between a river and a lake is that in one case there is a current, and in the other no current properly so called. In one case there is always length which is greater than the width, in the other case the body of water is sometimes substantially in that respect like a river, and sometimes it is nearly circular.

In each case the question is the same, viz: What is the portion of the body of water, and of the land under it, in front of the land on the shore, which belongs to the owner of the shore?

The riparian right arises because the ownership of the shore has attached to it the immediate adjoining part of the body of water in front of it, and extending out to the middle line of that water.

Such ownership does not depend upon the question whether the body of water is navigable or not navigable, deep or shallow, and it does not depend upon the form of the body of water.

It exists, because, by the conveyance of the land upon the shore, the portion of the body of water lying in front of the land is by the same instrument conveyed as far out as the middle line of the water.

Richardson v. Prentiss, 48 Mich., at 91 and 92.
Turner v. Holland, 65 Mich. at 466.

It is recognized in the cases that difficulties arise in determining the boundary lines in the case of lakes, but it is also recognized that difficulties of the same character arise both in the case of rivers and lakes.

The authorities while applying the rule where the form of the river permits of its application, also state that, owing to the bends, bays, indentations, and conditions of the river in particular cases, a modification of the rule may be required.

As the principle in the case of lakes is the same as in the case of rivers, and the objects sought are the same, the rule applied in the case of rivers will be applied to lakes where in a particular instance the form of the lake permits of the application, and the rule will be modified when the object sought requires the modification of the rule.

In *Rice v. Ruddiman*, 10 Mich. 125, Christiancy, J. stating that the only question involved was whether the *locus in quo* belonged to the riparian proprietor, said: "But if the water continues so shallow as to render the lands under it susceptible of beneficial private use to the *center line* of this narrow lake, then I have no hesitation in saying I think the riparian ownership extends to such center line" (p. 139). He further says that the lines would not necessarily extend into the lake in the direction of the side lines of the tract; that would depend on the shape of the lake and the relative rights of the owners; and adds: "When the question arises between adjoining owners, it will not be found difficult of decision within the principle of adjudged cases". The "adjudged cases" which established the principle under which the decision was made, and were referred to, were those

which related to rivers, such as *Lorman v. Benson* and other similar cases.

Manning, J., does not think the center should be taken for the boundary in our great lakes, like Lake Michigan, but as applied to an inland lake he does not dissent from the opinion of Justice Christiancy.

Justice Campbell says (p. 146): "I concur entirely in the views of my brother Christiancy"; and on page 147 he says "wherever use can be made of the bed of the water, in improvements near the shore, in waters not governed by the artificial common law rules of tide water ownership, I think the rules applicable to fresh water rivers are more reasonable and just, and are certainly more conformable to the common understanding and usage."

Justice Martin (p. 147), also concurs fully in the views of Justice Christiancy, and says the rights of riparian proprietors on our interior lakes "are the same as those of proprietors upon our navigable streams".

In *Richardson v. Prentiss*, 48 Mich. 88, the authorities are reviewed, which settle the rule in this state that a conveyance of land bounded by a water course carries the title to the bed of the stream *ad medium filum aquae*, in the absence of a contrary intention expressed in the conveyance; and the court, Marston, J., says: "In this state, whatever the law may be elsewhere, these same principles have been applied to lands fronting on the lakes."

In *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, the rights of riparian owners on Pere Marquette Lake were under consideration. The court, Champlin J., says: "It is the settled rule in this state that the title of the riparian owner extends to the middle line of the *lake or stream* of the inland water (citing the foregoing and other cases). This has become *a rule of property* in

this state, and the supreme court recognizes the right of each state to determine the doctrine for itself." (Citing *Barney v. Keokuk*, 94 U. S. 324.)

In the case of *Clute v. Fisher*, 65 Mich. 48, it was said that, "in case of a body of water so large that the lines of the sections or subdivisions of section held by the proprietors of the land adjoining or surrounding said lake, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said lake in accordance with the rule laid down by Justice Campbell in *Lincoln v. Davis*, 53 Mich. 390.

The case of *Hardin v. Jordan*, 140 U. S. 381, related to the ownership of the bed of a lake some two or three miles in length and very irregular in shape. The question to be decided is stated by the court as follows (p. 372). "The lake is two or three miles in extent, and the main question in the cause is whether the title of the riparian owner on such a lake extends to the center of the lake, or stops at the water's edge."

The court holds, Justice Bradley delivering the opinion of the majority, that this question must be decided by the local law of the state of Illinois. After stating that, in the judgment of the court, the law of Illinois in respect to this question of riparian ownership is the common law and nothing else (p. 385), the question in regard to the title of fresh water lakes and ponds is elaborately examined. In discussing the common law rule, the court quotes from the decision of Lord Selborne on the question as applied to lakes in Scotland, as follows: "If there are more riparian proprietors than one, it belongs ratably to them all. So far as relates to the solum or fundus of the lake, it is considered to belong in severalty to the several riparian proprietors if more than one; the space enclosed by lines

drawn from the boundaries of each property *usque ad medium filum aquae* being deemed appurtenant to the land of that proprietor exactly as in the common case of a river." It is held that the common law rule is the same as laid down by the judge in the Scotch case.

The conclusion upon this point is thus stated on page 391: "When land is bounded by a lake or pond of water, the water equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides, a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary the natural inference is that the middle line of it is intended, that is, the line equidistant from the land on either side."

Referring to the decision of Judge Gresham in the *State of Indiana v. Milk*, 11 Fed. R. 389, after quoting the argument used in that case against applying the river rule to lakes on account of the difficulties of applying it owing to the irregularities of the banks, etc., Justice Bradley says (pp. 397, 398): "We do not think this argument *ab convenienti* is sufficient to justify the abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say, we think the common law might be improved, and we will therefore improve it. As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bot-

toms or flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom and along its sides, and the use of converging lines would only be required at its two ends." The justice then refers to the case of *Clute v. Fisher* and also to that of *Stoner v. Rice*, 121 Ind. 51, in which the rule of *Clute v. Fisher* is adopted, and in relation to them, says (p. 399): "This method of disposing of the subject might be convenient and attended with some advantages if it were sanctioned by the law; but we do not see any greater reason for adopting this departure from the common law than that followed in the case of the *State of Indiana v. Milk*, before referred to."

The case of *Ledyard v. Ten Eyck*, (36 Barb. 102), cited in the case of *Hardin v. Jordan*, relates to riparian rights of an owner to a parcel of land lying at the *side and end* of Casnovia Lake in the State of New York, which lake is five miles long and three-quarters of a mile in width. The rule applied in that case was that the riparian owner holds to the middle line of the lake.

Gouverneur v. National Ice Company, 134 N. Y. 355, decided in 1892, lays down the rule as finally settled in the State of New York relating to riparian ownership upon non-navigable lakes. It is there held that the rule applicable to rivers applies to lakes. The lake in that case was about one hundred and fifty-one rods in length, and in the broadest place about forty-eight rods in width, and covered about forty-five acres. The opinion, which is concurred in by all the justices of the

court of appeals, contains the following (p. 868): "While a lake may be of such form as to render the designation in it of the lines of the several riparian owners, in certain cases, somewhat difficult, that fact in its relation to the practical effect of the rule is not an objection to its general application. No case will probably arise in which their respective rights in that respect may not be ascertained and defined in reference to the location and extent of the boundaries of the lands on or along the lake Bends or bays in rivers may in some instance present like difficulties. The value, such as they have, of small non-navigable lakes and ponds, as a general rule, is mostly in their relation to the adjacent lands."

Lamprey v. Metcalf, 53 N. W. 1139, (52 Minnesota 181), relates to riparian ownership upon a meandered lake comprising about three hundred acres. In this case, the opinion states the question to be as follows (p. 1140): "What rights in or to the soil under the water does the patentee of land bounded by a meandered inland lake acquire by his patent?" After reviewing authorities, the decision is that the right of riparian ownership applicable to rivers applies also to inland lakes. The court says (p. 1142): "The only reasons we have ever seen suggested for a distinction are, *first*, the supposed difficulty of running the lines between adjoining riparian owners of lands bordering on lakes, and *second*, the supposed injustice that might result in some cases in giving the owner of a very small estate on the shore of a lake a very large reliction in front of it. But it seems to us that neither of these are adequate reasons for departing from a well settled principle. Both of them are more imaginary than real, and would occur only in exceptional or extreme cases, and are almost as likely to occur in the

case of riparian ownership on a tortuous river, with an ill defined or changeable channel, as in the case of such ownership on the borders of a lake. The owner of a mere 'rim' on the bank of a river may sometimes acquire an accretion or reliction much larger than the parent estate, but that is incident to all riparian ownership; and it was never suggested in the case of a stream that such a state of facts furnished any reason for making the case the exception to the general rule."

Lembeck v. Nye, 47 Ohio St. 336, decided by the supreme court of Ohio in 1890, relates to riparian rights on Chippewa Lake, situated in Ohio, having an area of four hundred acres, oval in form its length from north to south being about twice as great as its length from east to west. After stating the rule in Ohio with reference to streams, which is identical with the rule in this state, and referring to the conflict of authorities as to the rule in relation to inland lakes, the court says, "In this state, where the rule is so firmly established that a boundary on a running stream carries the land to the middle or thread thereof, principles of analogy afford grounds for applying it to non-navigable lakes. The main reason for the rule in one case applies equally to the other. The existence of 'strips or gores' of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are 'strips and gores' of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable and alike vexatious in each of the cases, and that public policy which would seek to prevent them by a construction that would carry the title to the center of the highway, running stream, or non-navigable lake that may be made a boundary of the

lands conveyed, applies indifferently and with equal force to all of them. * * * That practical difficulties in the application of the rule may arise where the lake is so nearly round that it cannot be said to have any length as distinguishable from its breadth, or when the side lines of the respective parcels of land bounding on the lake approach it in such a direction that if they should be extended to the center thereof they would cross each other, is apparent. The latter difficulty is not at all unusual in the case of lands bounding on running streams, but does not prevent the application of the rule. *3 Washb. Real Prop.* 459, star note. Ang. Water courses, section 55, where the subject is learnedly discussed by those able authors, and this difficulty overcome."

The court further says that if there are non-navigable lakes within the state of such shape that no length can be affirmed of them, other appropriate rules must be adopted, which, in the light of all the circumstances, may be regarded as affectuating the intention of the parties, and are consistent with public policy, but that no difficulties arise in that case for "Chippewa lake is distinctly longer than it is wide and a prolongation to its center of the side lines of the respective parcels lying along its sides will not cause them to cross each other. The rule, of course, excludes those lands which merely touch the end of the lake and do not at all extend along its sides."

This case clearly holds that where a lake is of such form that it has a middle line, the same rule applies for determining the boundaries of adjoining owners as is applied in determining the boundaries of owners bordering on a stream.

Ridgway v. Ludlow, 58 Indiana, 248 (decided in 1877), relates to a lake situated in Indiana, similar in form to

Lake Angeline. The portion of the lake in dispute lay within the line of the south half of the section.

In deciding this case, the court uses the following language (p. 252): "The following questions of law are made in the case, and must be settled:

"1. Is the owner of the lands bordering on the margin of a non-navigable lake, by virtue of such ownership, also the owner of the land extending under the water, to the thread or a line along the middle of the lake?

"2. If such title to land, on the margin of such lake is acquired by twenty-five years' adverse possession and use, under the statute of limitation, will such title affect the ownership of such land under the water to the thread or middle of the lake?

"1 The first question, as to non-navigable rivers in the state of Indiana, is settled in the affirmative in the case of *Ross v. Faust*, 54 Ind. 471, and we can see no difference in principle in this rule, whether applied to non-navigable rivers or non-navigable lakes, when they are within the congressional surveys. In this view, we are directly supported by the case of *Rice v. Ruddiman*, 10 Mich. 125.

"'*Forsyth v. Sneal*, 7 Biss. 201, decided by Judge Drummond, in 1876, holds that a riparian owner on a lake two miles long and about three-fourths of a mile wide, has the same rights in the lake bed as a riparian owner has in the bed of a non-navigable river.

"The case of *Grand Rapids Ice and Coal Co. v. Ice and Coal Co.*, 102 Mich. 227, was decided in accordance with the same principle of division of the lake bed among the riparian proprietors and with reference to the middle line. The defendants had cut ice from the lake in front of their premises, which had a small frontage on or near the southwest corner of the lake and within the boundary lines of the plaintiff. if they

could be extended into the waters of the lake so as to fill out the sub-division of land which the plaintiff owned. The circuit court, in the finding of facts, stated that the defendant "entered upon the ice in front of the lands so leased and owned by it and cut and removed the ice in front of said lands and between the shore and the middle of the lake between lines which would be formed by running them at right angles from the center line of said lake to the shore line so that the defendant would have the same proportionate share of the center line of the waters of the lake as they have of the whole shore line on the south side of said lake."

It was nowhere stated on what part of this space bounded by the defendant's water frontage the middle line of the lake and the side lines, the ice was cut. The defense is based upon the proposition that the defendant was entitled to cut ice anywhere within the area mentioned, and that was the question before the court.

The rule of law is reiterated by the court in that case (p. 236) as follows: "Unless the contrary appear, a grant of land bounded by a water course conveys riparian rights (*Richardson v. Peters*, 48 Mich. 88); and the title of the riparian owner extends to the middle line of the lake or stream, of the inland waters. *Weber v. Boom Co.*, 62 Mich. 626, and cases cited at page 636)". The court also says: "That a lake may be of such form as to render the designation in it of the boundary of the several riparian owners somewhat difficult, is not an objection to the application of the rule".

But it is claimed by counsel for the plaintiff that the division of this lake by the middle line is impracticable, and that it must be divided by a decree in the

nature of a decree of partition, as if the riparian proprietors were tenants in common of the bed of the lake, and it is assumed that they should have the same proportion of the lake bed that they have of the water frontage of the entire lake and that in doing so a point which they call an "equitable center" must be taken, so that straight lines drawn from the shore at the point of intersection with the lines of proprietorship to this "equitable center" will divide the bed of the lake among the several riparian proprietors in that proportion.

In attempting to support this proposition the language of Mr. Justice Campbell, in the case of *Lincoln v. Davis* and *Jones v. Lee*, is cited.

The case of *Lincoln v. Davis*, related to riparian rights under the waters of Thunder Bay on Lake Huron. The language used is with reference to the large bodies of navigable waters of that kind. As a preface to the portion of the opinion quoted by counsel in their brief (p. 14) Mr. Justice Campbell, after stating that riparian rights existed, says, "But there are two difficulties in the way of defining these rights on our large lakes as they might be and are defined in the narrower waters connecting the lakes. One is the impossibility of defining boundaries where there is no *filum aquae*' and the other is the public character of the waters, which gives the state a much larger control than over strictly private waters". The irregularity of shape of the lake, Mr. Justice Campbell says, *prevents drawing lines to a common center.* In such case lines drawn to a common center must of necessity cut off some portions of the frontage, either almost or entirely from access to the water, as the lines drawn by counsel in this case do in several places.

In this case counsel seeks to divide the *entire area* of

the lake in proportion to the *entire shore frontage* of each proprietor, although a considerable part of the frontage of the plaintiff, which goes to make up its proportion, fronts on an arm or branch of the lake and not upon the main body of the lake at all. This arm or branch is on the south side of the eastern part of the lake, and the rule which plaintiff's counsel attempt to apply necessitates the taking of a considerable area over in the western part of the lake and so diminishing the proportion of the Lake Superior Iron Company, on account of this frontage on the arm of the lake in the eastern part.

The lines proposed by counsel, if adopted, would have the effect stated by Mr. Justice Campbell in the case of *Bay City Gas Light Company v. Industrial Works*, (supra) to exclude the owner of certain portions of the land from any water rights whatever.

If the rule is a good one it should be applicable, no matter how many riparian owners there are. It should be a rule under which the entire lake bed could be so divided that each subdivision fronting on the lake would have its proper proportion of the lake bed. Take the map (Exhibit F) upon which plaintiff's counsel draw their proposed partition lines. Draw lines from the intersection of each subdivision line to that same "equitable center" and it will be found that in several places a considerable stretch of land is left almost entirely without any portion of the lake bed. The line drawn from the southwest part of the lake to the "equitable center" it will be seen, leaves but a narrow strip of lake bed appurtenant to the shore on the north side in that part of the lake, and a strip about three times that width appurtenant to the plaintiff's land on the south shore. The line drawn from the east shore of the southeast arm of the lake to the "equitable cen-

ter" cuts off considerable of the shore of an adjoining proprietor entirely from the water, while the lines drawn from the eastern and western extremities of lot six on the south shore rapidly converge to a point leaving the claimed proprietorship of the plaintiff drawn to the line extended in front of the whole of said lot number six.

A better illustration of the mischief of attempting to adopt any other rule than the center line, as stated by Justice Campbell, in the Bay City Gas Light Company case, could not well be imagined.

The case of *Jones v. Lee*, related to the boundary between adjoining riparian proprietors on a bay in the east end of Muskegon Lake. This also was said to be a body of water deep and navigable, and that no beneficial use of the bed of the lake could be made, except near the shore; that the lake being navigable, riparian rights must be confined with reference to the paramount rights of navigation, and it was said that that depended upon principles which apply where immediate dependence upon the *filum aquae* is impracticable. It was said that if the whole body could be divided between the riparian proprietors it must be done by some rule of proportion. There was an entire absence of evidence in the case by which the court could determine the boundaries in the lake bed of the parties to the suit. It was found that the result of the judgment below was to extend the plaintiff's boundary lines in front of the defendant's property so as to practically exclude the defendant from any beneficial use of his water front and therefore the judgment was reversed.

It was not suggested, either in this case, or in the case of *Lincoln v. Davis*, that the boundary lines should be drawn to some common center. If a lake were exactly circular there of course could be no

middle line, it would be a point. But where a lake is distinctly longer in one direction than in the other there can always be, and there must always be, a middle line, and lines from the extremities of riparian proprietorships can be run to that line and, as said by the court in the case of *Hardin v. Jordan*, converging lines will be required only at the ends.

Plaintiff's counsel in presenting the case before the Michigan Supreme Court, conceded that the rule they had suggested could not be sustained, and that it would be more equitable to cut off the arms of the lake, leaving a body of water nearly circular, and then dividing the bed of the arms of the lake with reference to the *filum aquae*, and the body of the lake by lines converging to a common center (see opinion, Record p. 256). But in that case there would be three portions of the circle without any land fronting thereon, and those portions would not be appurtenant to any land.

We are not cited to any case where a division by drawing lines to a common center has been made, and we think no such case can be found.

Practically the same difficulties that exist in this case might and often do arise in the case of rivers. A river flowing from east to west might widen out and form exactly such a shaped body of water as we have in this case. A branch flowing into the main stream from the south might form a body of water exactly like the south arm of this lake. There could be no question but that in such case the middle line would be drawn through the center of the lake, and then a middle line in the branch would be drawn from the south to intersect the main center line at some point. The practical difficulties, as said by the court in numerous cases, would not prevent the application of the rule. We think, however, that these practical difficulties may

be taken into account as bearing upon the question whether the parties themselves haven't made a division of the lake bed, and whether that division so made ought not to be considered final.

Some of the remarks of counsel in their brief seem to indicate that they understand that the meander lines should be taken as the water front, and that the division of the lake bed, together with the upland inside the meander lines should be based upon the meander lines, the entire area within those lines to be considered the same as a part of the lake.

This, clearly, is not correct. The meander lines are made for the purpose of determining, not the boundary lines of the parcels of land conveyed by the government, but the quantity of land in the parcel conveyed by the government for which the government price of the land is charged.

> Railroad Co. v. Schurmeir, 7 Wall. 272.
> Hardin v. Jordan, 140 U. S., at 380, 381.
> G. R. & I. R. R. Co. v. Butler, 159 U. S., at 93.
> Lamprey v. Metcalf, 53 N. W. Rep., at 1140.
> Palmer v. Dodd, 64 Mich. 474, 475.

The plaintiff's map showing meandered lines is offered as a map of the lake, but, as testified to by the draftsman who made it, it was made by projecting the meander lines on paper, and not by a survey on the ground.

Two maps in evidence show the actual shore lines of lake and how the meander lines differ from them. We refer to defendant's exhibit 2a at page 164 of the Record, and defendant's exhibit 28, at page 218 of the Record.

The testimony of Mr. Cummings shows in detail how he arrived at the shore line, and from this, and the photographs, it will be seen that there was no difficulty in determining that line with practical accuracy.

It appears that the meander line at its point of intersection with the north and south center line of section ten north of the lake, was 300 feet north of the shore line and at a perpendicular height of 60 feet above. The rule of partition claimed by the complainant classes all that area north of the lake and within the meander lines as lake bed.

In conclusion we submit:

1st. That the writ of error should be dismissed, because

a. There is no Federal question in the case.

b. Neither the claim now made, or any other claim, under any law of the United States, was made before the Supreme Court of Michigan.

c. The Michigan Supreme Court did not decide adversely to the claims now made under the laws of the United States.

d. The decision of the question so raised was entirely unnecessary to the decision of the case.

e. The decision of the case by the Michigan Supreme Court, was based on grounds entirely independent of the alleged Federal question, which were sufficient to dispose of the case.

2d. That if the jurisdiction can be sustained, the claim made under the laws of the United States is obviously contrary to the law as settled by the decisions of this court, and has no color of ground to rest upon.

3d. That the parties by binding agreement, as well as by acts which constitute an estoppel, have themselves parceled out the territory in question, and fixed their boundary lines, and nothing remains for the court to do. The bill should be dismissed.

4th. If the territory were to be re-apportioned, it could not be lawfully or equitably done by drawing boundary lines to a common center.

DAN H. BALL,
BENTON HANCHETT,
Attorneys for the Defendant, The Lake Superior Iron Company.

PITTSBURGH AND LAKE ANGELINE IRON COMPANY *v.* CLEVELAND IRON MINING CO.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 260. Argued April 24, 25, 1900. — Decided May 21, 1900.

For the reasons set forth in the opinion of the court, the case was dismissed for want of jurisdiction.

THE case is stated in the opinion of the court.

Mr. F. O. Clark for plaintiff in error. *Mr. Alfred Russell* was on his brief.

Mr. Benton Hanchett and *Mr. James H. Hoyt* for defendants in error. *Mr. A. C. Dustin* and *Mr. George Hayden* were on their briefs.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The plaintiff in error and the defendants in error were respectively plaintiff and defendant in the court below, and we will so designate them. They were riparian owners on a body of water called Lake Angeline, in the State of Michigan, and this suit is to determine the extent of their respective ownerships to the bed of the lake. They all derived title through United States patents, and the controversy is claimed by plaintiff to arise from their construction and effect.

The trial court dismissed plaintiff's bill, and its action was affirmed by the Supreme Court of the State, 76 N. W. Rep. 395, and this writ of error was then sued out.

A motion is made to dismiss for want of jurisdiction in this court, on the ground that no Federal question was raised in the state court, or, if one was raised, the decision of the state court was rested on a question not Federal, which was sufficient to sustain the judgment.

Under the circumstances of this case it will be more orderly

to consider the latter ground first, and its proper determination requires a consideration of the opinion of the Supreme Court, of its statement of facts (which we condense) and of its conclusions from those facts:

"Lake Angeline was situated on sections 10, 11, and 15, T. 47 N., R. 27 W., and was within the corporate limits of the city of Ishpeming, in Marquette County. It contained 148.61 acres within the government meander lines. It was a mile in length east and west, and 1690 feet in width on the centre line of section 10, which is its widest point.

* * * * * * * *

"The three parties to this litigation own all the lands surrounding this lake; the complainant owning that part of section 15 bordering upon the lake; the defendant Cleveland Iron Mining Company owning that part of sections 10 and 11 bordering on the lake east of the centre line of section 10; and the defendant Lake Superior Iron Company owning that part west of said centre line. These three mining corporations have owned this land about thirty years and have been engaged in mining upon their respective properties for more than twenty years. For the sake of brevity, these companies will be designated by their initial letters."

No ore was known to exist in the bed of the lake until the winter of 1886 and 1887, when it was discovered on territory not owned by plaintiff, but plaintiff was informed of the discovery. Afterwards ore was discovered on its territory. The extent and locality of the ore beds were not exactly known, and negotiations were entered into for pumping out the lake, and ended in a contract between the parties.

It recited the discovery of the ore and the necessity of pumping out the lake, in order to "economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to."

It provided for the purchase of a pumping apparatus which one B. C. Howell had, and, in consideration of the "mutual considerations received each from each, the receipt of which is hereby respectively acknowledged."

The agreement then provided what proportion of the cost of

the pumping apparatus and plant should be respectively borne by the parties both for its purchase and maintenance, and the expenses of the work. And it was found by the Supreme Court that the agreement was formally executed. The acknowledgment by plaintiff recited that it was done by its president and secretary, and also that it was done on behalf of the corporation.

The total cost of draining and keeping water out of the lake until January 1, 1897, was $76,488.38. "Of this the C. I. M. Co. paid $44,149.68; the L. S. I. Co. $17,147.18; and the complainant $7801.38. The water under the southeast arm of the lake was comparatively shallow. A vast body of mud was found in the bottom of the lake, and the two defendants incurred an expense, in attempting to remove it, of $20,227.53."

"After the execution of this contract, each party worked upon its own property as defined thereby. The complainant mined out all the valuable ore under the southeast arm, and afterwards filled its opening with the waste rock. The L. S. I. made explorations at considerable expense, and the C. M. I. Co. made the five drill holes above referred to from the complainant's mine, and ran a drift through the rock underneath the lake nearly to the south line of section 10, and, after reaching ore, ran drifts and cross cuts with a view to determining the value of the ore and ascertaining if there was sufficient to open and equip a mine. All this involved large expense.

"The section line was regarded as the line dividing these properties. Nails were driven in the timbers underground to indicate the line. In 1894 complainant made an innocent trespass north of the line, for which an amicable settlement was made. In 1896 the C. I. M. Co. trespassed upon complainant's property south of the line, and amicably settled for it. Maps were frequently exchanged with each other. Complainant asked and obtained permission from the C. I. M. Co. for the construction of a railroad track north of the section line, which was constructed and has ever since been in operation by complainant. On March 21, 1894, the C. I. M. Co. executed a lease to complainant, granting it the right to use land north of the section line for stock-pit grounds and the erection of temporary

structures for mining purposes. Other acts also were done by the respective parties in recognition of the fact that the south line of section 10 was the boundary line as stated in the above agreement. This state of affairs continued until November, 1896, when complainant served a notice upon the defendants that it claimed title to certain lands north of the section line.

* * * * * * * *

"Complainant commenced mining on lots four and five in 1863. The hill was very near the shore of the lake, and complainant dumped its waste rock into the lake and filled in several acres north of the section line. Upon this made land north of the line it erected some buildings, the most of which it removed to the south of the line in 1887. Complainant filed its bill of complaint November 23, 1896."

Chief Justice Grant, delivering the opinion of the court, stated the theory of the plaintiff's bill to be—

"That the territory formerly covered by the waters of this lake should be divided among the shore owners in proportion to the amount of shore frontage owned by each; that such ownership extends to the center of the lake to be equitably established by the court; and that such territory should be partitioned by convergent lines drawn from the outside limit of each frontage to a convergent point called the equitable centre. To the bill is attached a map purporting to contain such equitable division."

And after stating in what apportionment of the bed of the lake this would result, stated the claims of the defendants as follows:

"(1) The patent under which the defendant, the Cleveland Iron Mining Company, claims title gave it title to the whole east half of section ten (10) to the south line thereof, and complainant is barred from objecting to this claim because it has treated a body of water covering a portion of that territory as of no value, and joined in the draining of the water as if the land was merely swampy ground valuable only when reclaimed and made dry land.

"(2) Because it has title by adverse possession for more than fifteen (15) years.

"(3) Because the south section line of ten (10) was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts, and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.

"(4) Because the pumping contract is an estoppel by deed against the complainant from now asserting title.

"(5) Because the complainant is estopped by matter *in pais* from asserting title to the land.

"(6) Because the complainant is estopped by its laches.

"(7) Because as a tenant of a portion of the premises in dispute complainant is estopped to deny defendant's title."

That of Lake Superior Iron Company as follows:

"1. That there has been a practical division of the lake bed between the parties; that contracts, explorations and mining operations have been carried on on the strength of such division for many years, in which large sums of money have been expended, without any certainty at the time of such expenditures that returns would be realized by the defendants therefrom, and that, by such division and long course of construction between the parties, the complainant is estopped to claim any portion of the lake bed lying north of the section line.

"2. That the pumping contract, executed by the several parties, under their corporate seals, and expressly providing that it shall be binding upon the successors and assigns of the several parties, making it a contract running with the land, amounts to a division of the lake bed by deed duly executed by the several parties.

"3. That the pumping contract is so entirely based upon the division of the lake bed above mentioned, and said division forms so essential a part of the contract, that, if such division be set aside or disregarded, the contract itself must fall; that in such case, not only is the agreement to continue the drainage of the lake at an end, but either party has a right to demand that the drainage of the lake must stop and the water allowed to rise to its original level—a result which, after all that has

been done under the pumping contract, and in reliance upon it, would work great injustice to the defendants.

"4. That if the original division of the lake be disregarded and a new division must be made, such division must be made by the middle line or thread of the lake, in accordance with the common law rule for division of the bed of fresh water streams."

Commenting on the claims the learned Chief Justice said:

"The situation is anomalous and the books present no similar case. In March, 1892, the parties entered into an agreement to extinguish the lake by pumping out the water, leaving the territory dry ground. They agreed upon an apportionment of expense substantially according to the territory within the lines of the government survey. The lake no longer exists. Nearly five years after this suit is planted upon the theory that the lake exists, and that the court must make an equitable division from a common equitable centre. All the parties, however, seem to have discussed the question as of a lake actually in existence."

The difficulties of apportionment on plaintiff's theory were stated, and the opinion proceeded as follows:

"The above statement is sufficient to show the difficulty in making an equitable apportionment, and while nothing was said during the negotiations leading up to the agreement, or in the agreement itself, in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood. It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt. Complainant had discovered a mine on its territory, south of the line, and extending under an arm of the lake. At that time it was the only one which it was known would be benefited by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine whether there existed under the bed of the

lake ore worth mining. The contract, if valid, established the line beyond dispute.

"The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this contract, recognized as valid, and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of *Clute* v. *Fisher*, 65 Mich. 48, as establishing the rule that the territory should be divided by the government lines, and that it rested upon that case as the established law until the decision of *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Mich. 227, claiming that the latter overruled the former, and that in making that contract there was a mutual mistake which entitles it to the relief prayed. The former case was decided in January, 1887, and the latter in June, 1894."

The case of *Clute* v. *Fisher* was discussed, and disposing of the question raised upon the theory that plaintiff relied upon that case in its negotiations and contract with the defendant, and that all the parties so understood it, it was said:

"We will first discuss and dispose of the question raised upon the theory that complainant relied upon the decision of *Clute* v. *Fisher* as an authoritative enunciation of the law in its negotiations and contract with the defendants, and that all the parties so understood it. The following then is the situation: We find that the parties in reliance upon that case entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each. Complainant made the contract with knowledge that it gained territory south of the line, known to be valuable, while it surrendered territory north of the line, not then known to possess any value. All parties are chargeable with knowledge that each was to incur risks of its own, make its own expenditures upon its own land according to the agreement, and, by reason of its expenditures and improvements, would be placed in such a position that it could not be restored to its former *status quo*.

"The anticipated result came. The explorations, expenditures and improvements were made, each company making them at its own risk. It is impossible to restore the *status quo* or to

render exact justice between the parties, because the data are not in existence. It is doubtful if a result approximately correct could be reached upon an accounting. It would be impossible to determine its correctness within many thousands of dollars.

"The result of complainant's contention would be that, whenever any case has been overruled, every transaction or agreement based upon that decision may be set aside by the courts, if not barred by the statute of limitations. The agreements and settlements of parties, made with full knowledge of the facts and in reliance upon the law, ought to be as binding as the judgment of the court in a particular case. If ten other similar suits had been pending when *Clute* v. *Fisher* was decided, and judgment had been rendered in reliance upon that decision, the courts could now set them aside. The law is not so unstable as to permit such results. Judgments rendered and contracts made upon the faith of the law as enunciated in the decision of the court, in the absence of fraud or misrepresentation, must stand. When the decision is overruled, the overruling decision controls only subsequent transactions. Such is the rule recognized by the decisions and text writers."

The opinion then proceeded to say that the mistake of plaintiff was one of law, and the case was "stripped of all other circumstances. It contains no element of misrepresentation, imposition, suppression, undue influence, undue confidence, imbecility or surprise. Neither said or did anything to mislead the other. Each acted with deliberation and with complete knowledge of all the facts. The sole basis of complainant's claim is that the decision of this court, upon the faith of which the contract was made, was subsequently overruled."

And it was decided that the case did not come "within any exception to the rule that a mistake of law does not furnish any ground for relief."

It was then considered if the contract settling the boundary line and acquiescence therein and the acts done thereunder estopped plaintiff from asserting a different line, and it was held that it did against the claim that the statute of frauds prevented estoppel — against the claim that a corporation could not settle

a boundary line without a meeting and vote of its stockholders. "The contract was the act of the three parties to it," the court said,

"It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well as the defendants, paid out large sums of money under it. All are now estopped to deny its due execution and validity.

* * * * * * * *

"Complainant is entirely without equity. It doubted the correctness of the rule of *Clute* v. *Fisher*, and thought that a different rule might sometime prevail. It was then its duty to take steps to test the question before permitting defendants to enter into a contract and explorations involving over $100,000. It should at least have informed the defendants of its claims, and given them the opportunity to make a contract with that in view.

"This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact that the venture proved successful after large expenditure creates no equity for this complainant. The skill, energy and money of that company developed a valuable property. It ought in justice to reap the benefit, and the complainant ought to be estopped to participate in the benefit, unless an unbending rule of law prevents. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 592; *Clegg* v. *Edmondson*, 8 De G. M. & G. 787.

"It would not have offered to bear its share of the loss if unsuccessful, nor could it have been compelled to.

"Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Everyone is presumed to know the law. Therefore, it must be presumed to have known of the law enunciated in *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.* It had an able attorney, who keeps well versed in the decisions of the courts of this State. Yet it waited two years and a half before asserting its claim, and still nine months after obtaining the opinion of its attorney that *Clute* v. *Fisher* was no longer the law. It waited until

circumstances and conditions have so changed that it is impossible to restore the *status quo*."

It is manifest that the Supreme Court rested its decision on the grounds (1) that the pumping contract was a settlement of boundaries between the contestants; (2) that what was done and expended under it worked an estoppel against the plaintiff; (3) laches of the plaintiff, in asserting its claim whereby the *status quo* could not be restored.

It requires no argument to demonstrate that neither of these grounds involves a Federal question. But plaintiff in error contends that they were all made to depend upon a Federal question, which the court erroneously decided, and therefore that they necessarily involve such question.

It is claimed to arise under conflicting claims under United States patents. "This," counsel for plaintiffs say, "presents the *fundamental Federal* questions [the italics are counsel's] involved in this case, viz.: Did the complainant acquire title to the centre of the lake by virtue of its ownership of said government lots 2, 3, 4 and 5; or did defendants obtain title by virtue of their several patents, to a point where the south line of section 10, if projected east and west through the water of the lake, would run?" And this asserted Federal question is said to have been decided by the Supreme Court of Michigan in the following language of its opinion: "The Cleveland Iron Mining Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity."

What this language means we do not think the opinion of the court leaves in doubt. But whether plaintiff did or did not own land of section 10 which could be or could not be measured by metes and bounds; whatever its rights and the rights of the other parties were, they could be settled by agreement, and could be made the foundation of business transactions and enterprises. The Supreme Court determined they were so made and could be so made under the laws of Michigan.

But again, and whatever the error in that conclusion, (we do

not assert there was any,) the court decided, as an independent ground of estoppel, that plaintiff was guilty of laches, and that was sufficient to sustain its judgment.

The case must, therefore, be dismissed for want of jurisdiction, and it is so ordered.